144-640

RECORD, CASE No. 13,298.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 236.

PLEASANT H. PENDLETON, CORNELIA E. DIXON, AND CHARLES V. DIXON, HER HUSBAND; MARY E. PENDLETON, AND FRANCIS H. PENDLETON, PLAINTIFFS IN ERROR,

vs.

CHARLES H. RUSSELL, RECEIVER OF THE KNICKERBOCKER LIFE INSURANCE COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED OCTOBER 13, 1888.

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INDEX.

	Original.	Print.
Order granting leave to file claim and referring same to referee	1	1
Claim	1	1
Evidence before referee	3	2
Exhibits offered	3	2
Exhibit 3—Record circuit court United States, western district of Tennessee, in Pendleton *et al. vs.* Knickerbocker Life Ins. Co.	3	2
Order on mandate	4	2
Judgment	8	4
Stipulation as to judgment	9	5
Further evidence offered	10	5
Concessions	10	5
Petition of Charles H. Russell, receiver, to amend writ of error	13	7
Further evidence offered, &c.	14	8
Judgment of supreme court of New York, December 29, 1882	15	8

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	Original.	Print.
Referee's report	18	10
Findings of fact	18	10
Conclusions of law	22	12
Findings proposed by claimants	23	12
Exceptions of claimants to findings	28	15
Notice of motion to confirm report	30	16
Order confirming report	31	17
Stipulation in lieu of evidence	32	17
Notice of appeal to general term	33	18
Judgment of general term	34	18
Notice of appeal to court of appeals	36	19
Clerk's certificate	37	19
Opinion of general term	38	20
Remittitur from court of appeals	47	23
Judgment on remittitur	51	24
Writ of error	54	25
Affidavit of service of citation	56	26
Citation	58	27
Bond	61	27
Opinion of court of appeals	63	29

1 At a special term of the supreme court, held at chambers, in the court-house, in the city of New York, on the 3d day of February, 1886.

Present: Hon. George C. Barrett, justice.

THE PEOPLE OF THE STATE OF NEW YORK *vs.* THE KNICKERBOCKER LIFE INSURANCE COMPANY. } In the Matter of the Claim of Pleasant H. Pendleton *et al.*

On reading and filing the petition of Pleasant H. Pendleton, Cornelia E. Dixon, Charles V. Dixon, her husband; Mary E. Pendleton, and Francis H. Pendleton, praying leave to file their claim against the receiver of the above-named defendant, and after hearing A. Walker Otis, of counsel for the petitioners, and James A. Dennison, of counsel for the receiver, and William A. Poste, deputy attorney general, consenting thereto, it is ordered that said petitioners have leave to file their said claim, and that the said claim be referred to Leroy B. Crane, Esq., general referee herein, to try and determine the validity thereof.

Statement of claim of Pleasant H. Pendleton, Cornelia E. Dixon (formerly Pendleton) and her husband, Charles V. Dixon, Mary E. Pendleton, and Francis M. Pendleton against the Knickerbocker Life Insurance Company.

2 Said claim is for $17,560.12 and $90.34 costs, being in all the sum of $17,650.46, evidenced by a judgment therefor recovered by these claimants against the Knickerbocker Life Insurance Company on the 25th day of January, 1886, in the circuit court of the United States for the western division of the western district of Tennessee.

On July 14, 1870, said Knickerbocker Life Insurance Company issued and delivered to one Samuel H. Pendleton its policy No. 2346, bearing said last-mentioned date, in the sum of ten thousand dollars upon the life of said Samuel H. Pendleton for the benefit of these claimants.

Said Samuel H. Pendleton died in March, 1872, said policy being then in full force and virtue.

On September 10, 1875, these claimants instituted an action on said policy against said company in the first circuit court of Shelby county, Tennessee.

On April 1, 1876, said company removed said cause into the circuit court of the United States for the western district of Tennessee, and there appeared by counsel and submitted to the jurisdiction of said court and defended said action.

That thereafter and on the 25th day of January, 1886, a judgment was recovered in said action in favor of claimants and against said company for $17,560.12 damages and $90.34 costs as aforesaid.

A. WALKER OTIS,
Attorney for Claimants, 2 William Street, New York.

(Verified by A. Walker Otis February 6, 1886.)

3 N. Y. Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK
vs.
THE KNICKERBOCKER LIFE INSURANCE COMPANY.
} In the Matter of the Claim of Pleasant H. Pendleton *et al.*

Before Leroy B. Crane, Esq., referee.

NEW YORK, *February* 18, 1886.

Appearances: A. Walker Otis, Esq., for the claimants; James A. Dennison, Esq., for the receiver.

Claimants' counsel offers the printed record of the case of The Knickerbocker Life Insurance Company, plaintiff in error, against P. H. Pendleton *et al.*, in the Supreme Court of the United States, filed October 12, 1881, and it is marked Exhibit 2.

Claimants' counsel offers in evidence a transcript of the record from the circuit court of the United States for the western division of the western district of Tennessee in the last-mentioned case of Pendleton and others against the Knickerbocker Life Insurance Company, certified by the clerk of that court under date of January 26, 1886, and it is marked Exhibit 3.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

4 In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof begun and held for its November term, A. D. 1885, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 15th day of December, A. D. 1885, in the following cause, to wit:

P. H. PENDLETON and Others, Plaintiff-,
vs.
THE KNICKERBOCKER LIFE INSURANCE COMPANY, Defendant.
} Order on Mandate.

The defendant having produced in open court the mandate issued December 5th, 1885, from the Supreme Court of the United States, which is in words and figures following—that is to say:

UNITED STATES OF AMERICA, *ss:*

[L. S.] The President of the United States of America to the honorable the judges of the circuit court of the United States for the western district of Tennessee, Greeting:

Whereas lately, in the circuit court of the United States for the western district of Tennessee, before you or some of you, in a cause between Pleasant H. Pendleton, Cornelia E. Dixon (formerly Pendleton) and her husband, Charles V. Dixon, Mary E. Pendleton,

and Francis M. Pendleton, plaintiffs, and The Knickerbocker
5 Life Insurance Company, defendant, wherein the judgment of the said circuit court entered in said cause on the 19th day of May, A. D. 1881, is in the following words, viz:

"Came the parties, by their attorneys, and thereupon, for good and satisfactory reasons appearing to the court, it ordered that the judgment rendered January 10, 1881, upon the verdict of that date, be set aside and for naught held, and the motion of the defendant for a new trial, after argument and full consideration by the court, is overruled, and it is therefore ordered and adjudged by the court that the plaintiffs have and recover of the defendant said sum of fifteen thousand one hundred and seventy-five dollars ($15,175), the amount of the verdict aforesaid, together with interest thereupon from the date said verdict was rendered, to wit, January 10, 1881, at the rate of six per cent. per annum, together with the court costs to be taxed, for all which let execution issue," as by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of a writ of error agreeably to the act of Congress in such case made and provided, fully and at large appears; and whereas, in the present term of October, in the year of our Lord one thousand eight hundred and eighty-five, the said cause came on to be heard before the said Supreme Court on the said transcript of record and was argued by counsel, on consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, reversed with costs; that the said defendant, The Knickerbocker Life Insurance Company, recover against the said plaintiffs one hundred and eighty-four dollars and ninety-one cents for its costs herein expended and have execution therefor.

6 And it is further ordered that this cause be, and the same is hereby, remanded to the said circuit court with directions to award a new trial.

NOVEMBER 16, 1885.

You therefore are hereby commanded that such execution and further proceedings be had in said cause in conformity with the opinion and judgment of this court as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding.

Witness the Honorable Morrison R. Waite, Chief Justice of said Supreme Court, the fifth day of December, in the year of our Lord one thousand eight hundred and eighty-five.

Costs of Defendant.

Clerk	$83 71
Printing record	81 20
Attorney	20 00
	$184 91

Endorsed: Filed Dec. 11th, 1885.

And it appearing therefrom that the judgment rendered herein by this court May 19th, 1881, was, on November 16th, 1885, reversed by the said Supreme Court and a new trial awarded, it is therefore ordered by the court that said mandate be filed, and that the cause be docketed and stand for trial at this term, and that the defendant recover of the plaintiffs the costs of the defendant in this cause in the said Supreme Court taxed at the sum of one hundred and eighty-four $\frac{91}{100}$ dollars, for which let execution issue.

THE UNITED STATES OF AMERICA,
Sixth Judicial Circuit, Western District of Tennessee.

7 I, Bell W. Etheridge, clerk of the circuit court of the United States for said western district of Tennessee, do hereby certify that the paper hereto attached is a full, true, perfect, and correct copy of the original order on mandate in said court as the same now appears of record and upon the files in my office in the following cause, to wit, P. H. Pendleton and others *vs.* The Knickerbocker Life Insurance Company, No. 2144.

In testimony whereof I have hereunto set my name and affixed the seal of said court, at office, in the city of Memphis, this 26th day of January, A. D. 1886, and of the Independence of the United States the 110th year.

[L. S.] BELL W. ETHERIDGE, *Clerk.*

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof begun and held for its November term, A. D. 1885, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 25th day of January, A. D. 1886, in the following cause, to wit:

8 PLEASANT H. PENDLETON, CORNELIA E. Dixon and Her Husband, Charles V. Dixon, Mary E. Pendleton, Francis M. Pendleton, the Last by Next Friend, K. Smith, Plaintiffs,
vs.
THE KNICKERBOCKER LIFE INSURANCE COMPANY, Defendant.
No. 2144. Judgment.

This cause being called up for trial, thereupon came a jury of good and lawful men, to wit, James Steele, D. Pante. Robert McKenna, T. F. Tobin, John Herring, Ike A. Chase, D. F. Goodyear, K. J. B. L. Wynn, T. A. Hamilton, Leroy Mitchell, Sam. Letcher, and A. J. Cozart, who, being duly elected, empanelled, and sworn, after hearing the evidence submitted and the instructions of the

court, upon their oaths do say they find the issues joined in favor of the plaintiffs for debt and damages the sum of seventeen thousand five hundred and sixty $\frac{12}{100}$ dollars ($17,560.12). It is therefore ordered and adjudged that plaintiffs have and recover of and from the defendant, The Knickerbocker Life Insurance Company, the said sum of seventeen thousand five hundred and sixty $\frac{12}{100}$ ($17,560.12) dollars and the costs herein, for all of which let execution issue.

THE UNITED STATES OF AMERICA,
Sixth Judicial Circuit, Western District of Tennessee.

I, Bell W. Etheridge, clerk of the circuit court of the United
9 States for said western district of Tennessee, do hereby certify that the paper hereto attached is a full, true, perfect, and correct copy of the original judgment in said court as the same now appears of record and upon the files in my office in the following cause, to wit, Pleasant H. Pendleton, Cornelia E. Dixon and her husband, Charles V. Dixon, Mary E. Pendleton, Francis M. Pendleton, the last by next friend, K. Smith, *vs.* The Knickerbocker Life Insurance Company, No. 2144.

In testimony whereof I have hereunto set my name and affixed the seal of said court, at office, in the city of Memphis, this 26th day of January, A. D. 1886, and of the Independence of the United States 110th year.

[L. S.] BELL W. ETHERIDGE, *Clerk.*

It is stipulated by and between the respective counsel that the judgment taken on the 25th of January, 1886, against the Knickerbocker Life Insurance Company was a judgment by default.

Mr. Otis files the claim of Pleasant H. Pendleton with the referee, and it is marked Exhibit 4.

The claim being now filed for the first time, the receiver has the right hereafter to file objections to the claim with the same force and effect as if they were filed heretofore.

NEW YORK, *February* 19, 1886.

10 Met pursuant to adjournment.

Present: Counsel as before.

Counsel for the receiver offers in evidence from the printed transcript of the record, already offered in evidence, the testimony beginning at the top of page 13 and ending at the bottom of page 18; also beginning with the words "The draft of $325," in the next to the last line on folio 52, page 19, to and including the signature "Moses Greenwood," folio 91, page 35.

Claimants' counsel objects to the testimony as irrelevant and immaterial upon the ground that the issue here is upon the judgment and not upon the original cause of action.

Counsel for the receiver objects in time, and does not offer that portion of the testimony of Moses Greenwood which states in answer to the ninth interrogatory that Dr. Pendleton had no reason to believe that his draft for $325 would be honored.

Claimants' counsel offers the transcript of the record in evidence for the purpose of showing the nature and character of the various proceedings taken in the case.

Counsel for the receiver concedes that counsel for the claimants has a right to make such objections as may be advisable to the testimony tending to show the invalidity of the original cause of action as immaterial and irrelevant.

It is conceded by counsel on both sides that some time after the appointment of Mr. Charles H. Russell as receiver of the Knickerbocker Life Insurance Company he discovered the pendency of the writ of error in the Supreme Court of the United States, taken
11 from the judgment in the case of Pleasant H. Pendleton and others against the said insurance company; and thereupon, acting under the orders of the supreme court of the State of New York, which appointed him receiver, he retained counsel to argue the case upon the hearing of the writ of error in the Supreme Court of the United States, and thereafter the Supreme Court of the United States handed down its decision reversing the judgment and awarding a new trial, but retained the mandate until the next term according to its practice; that, pending the retention of the mandate the counsel for Pleasant H. Pendleton and others filed a petition for reargument, and thereupon the clerk of the Supreme Court of the United States sent to counsel employed by the receiver a copy of such petition; that soon before the *the* time for issuing the mandate the clerk of the Supreme Court of the United States advised the judge who wrote the opinion that it appeared that the original writ of error and citation were addressed to Pleasant H. Pendleton alone instead of all four of the plaintiffs below, and thereupon the Supreme Court of the United States, of its own motion, made an order requiring the parties to the writ of error to show cause why the judgment of the Supreme Court should not be vacated and set aside and the writ of error dismissed, and thereupon such order was served upon the counsel who argued the case in the Supreme Court of the United States; that thereupon, under the advice of counsel, said receiver filed the petition which appears in the transcript of record given in evidence in the case, dated April 2, 1885, and on the 6th day of April, 1885, counsel for the receiver and for the defendants in error were heard before the Supreme Court of the United States
12 upon such order to show cause; that thereafter the Supreme Court of the United States made its order amending the writ of error and citation by adding the names of the three plaintiffs below who were omitted, upon condition, however, that they have their day in court by the allowance of a reargument in the Supreme Court of the United States; that counsel for both sides accepted such condition, and thereafter the cause was reargued before the Supreme Court, whereupon the judgment was again reversed and a new trial ordered; that thereafter counsel for the receiver applied for and obtained from the Supreme Court of the United States a mandate reversing said judgment of the court below, and by reason of obtaining said mandate and the entering of an order in the circuit court of the western district of Tennessee awarding a new trial and revers-

ing the judgment, the supersedeas bond was discharged and the sureties who signed said bond surrendered the security that they had obtained from the Knickerbocker Life Insurance Company to indemnify them for their signature to said bond.

And it is further conceded, for the purposes of this hearing, that the securities thereby released were of the value of $20,000.

That, with the exception of the circumstances stated in the foregoing concession, the said receiver exercised no personal management or control of the said case of Pleasant H. Pendleton and others against the Knickerbocker Life Insurance Company, either in the circuit or supreme court.

13 In the Supreme Court of the United States.

THE KNICKERBOCKER LIFE INSURANCE COMPANY, Plaintiff in Error,
vs.
PLEASANT H. PENDLETON *et al.*, Defendants in Error.
} No. 73. October Term, 1884.

The petition of Charles H. Russell respectfully shows to this honorable court:

I am the receiver of the plaintiff in error above named, The Knickerbocker Life Insurance Company, duly appointed to administer its affairs and distribute its assets among those entitled thereto. I was appointed as such receiver December 29th, 1882.

The above-entitled case was not transferred to my charge nor did I ever see the papers therein until long after the expiration of three years from the time of the rendition of the judgment herein in the circuit court of the United States for the western district of Tennessee. No irregularity therein was ever called to my attention, nor did I know of the same until the issuance of the present order to show cause by this court in March, 1885, for the vacating of the judgment of this court of January 5th, 1885, and the dismissal of the writ of error.

Upon taking charge of the property of said company I found that it had mortgaged three houses in the city of Brooklyn to the sureties upon the supersedeas bond herein as security for their liability thereon in the sum of $15,000, and had assigned to them a
14 further mortgage of $6,000 upon property in Jersey City, and that all of said property now remains encumbered thereby, awaiting the issuance of the mandate of this court.

Your petitioner respectfully prays leave of this honorable court that the writ of error herein be amended by adding the names of such other parties as appear by the record to be necessary thereto, *nunc pro tunc* or otherwise, according to the practice of this court and the equity of the case, and that the mandate thereon may be remitted to the court below.

And your petitioner will ever pray.

Dated New York, April 2d, 1885.

CHARLES H. RUSSELL, *Petitioner.*

(Verified by Charles H. Russell April 2d, 1885.)

(Endorsed: Filed April 6th, 1885.)

Counsel for the receiver offers in evidence the judgment of the supreme court of the State of New York taken on the 29th day of December, 1882, at the city of Schenectady, and entered on the same day, in the action of The People of the State of New York against The Knickerbocker Life Insurance Company, appointing Charles H. Russell receiver of the company and providing for the matters as therein set forth.

It is admitted in evidence and marked Exhibit 5.

It is conceded by counsel on both sides that the receiver qualified as provided in said judgment and entered upon the active duties of his trust.

Adjourned for argument and submission of briefs to Tuesday, February 23, at 1.30 p. m.

15 At a special term of the supreme court of the State of New York, held at the supreme court chambers, in the city of Schenectady, on the 29th day of December, 1882.

Present: Hon. Judson S. Landon, justice.

Supreme Court, Schnectady County.

THE PEOPLE OF THE STATE OF NEW YORK *against* THE KNICKERBOCKER LIFE INSURANCE COMPANY, Defendant.	Judgment Entered on the 29th Day of December, 1882, at 2 hours — minutes p. m.

The summons and complaint in this action having been duly served on the defendant, The Knickerbocker Life Insurance Company, and said defendant having appeared in said action by Francis C. Cantine, Esq., attorney and counselor at law, of 239 Broadway, New York city, and served on the plaintiff's attorney an offer in writing to allow judgment to be taken against it for the relief demanded in the compiaint with costs; and the plaintiff, by Leslie W. Russell, their attorney general, duly accepted such offer and served a notice thereof in writing on the defendant's attorney; and said defendant having waived notice of all further proceedings herein up to and including the entry of judgment and the appointment of a receiver and due proof of the facts alleged in the complaint having been made—

Now, upon reading and filing said summons and complaint and the offer of judgment and affidavit of F. C. Cantine of his au-
16 thority to make such offer and the notice of acceptance thereof and the affidavit of authority to make the same and due proof of service thereof on F. C. Cantine, attorney for defendant, and the waiver by said defendant of notice of all further proceedings herein, including entry of judgment and appointment of a

receiver, and, on motion of Leslie W. Russell, attorney general and attorney for plaintiff, no one else appearing—

It is adjudged and decreed that the defendant, The Knickerbocker Life Insurance Company, be, and the same is hereby, dissolved and its corporate rights, privileges, and franchises forfeited.

And it is further adjudged and decreed that the defendant, The Knickerbocker Life Insurance Company, its trustees, directors, managers, and other officers, attorneys, and agents, be, and each of them hereby is, forever re-t-ained and enjoined from exercising any of the corporate franchises, powers, rights, or privileges of the defendant and from collecting or receiving any debts or demands belonging to or held by the defendant and from paying out or in any manner interfering with, transferring, or delivering to any person any of the deposits, moneys, securities, property, or effects of the said defendant or held by it.

It is further adjudged and decreed that Charles H. Russell, Esq., of Brooklyn, N. Y., be, and he is hereby, appointed receiver of all the property, things in action, and effects, real and personal, of the said corporation and of all the property held by it, with the usual powers and duties enjoined and exercised by receivers, according to the practice of this court and of the statutes in such cases made and provided.

It is also adjudged and decreed that before entering upon the duties of his trust such receiver execute and file with the clerk of Schenectady county a bond, with at least two sufficient surities, to the people of the State of New York in the penal sum of one hundred thousand dollars, conditioned for the faithful discharge
17 by said receiver of the duties of his trust, such bond to be approved as to its sufficiency, form, and manner of execution by a justice of the supreme court after due notice of the time and place of application for such approval has been first given to the attorney general of the State of New York. Upon the filing of such bond thus approved the said receiver is authorized and directed to take possession of and sequestrate the property, things in action, and effects, real and personal, of the defendant herein and to take and hold all property held by or in possession of said defendant corporation.

It is further adjudged and decreed that such further application may be made to this court under the provision of this decree or order as the receiver may be advised is proper and necessary for his instruction in the management and conduct of his trust.

It is further adjudged and decreed that no application shall be made to any court nor shall any action of the court be asked or suffered by the receiver relative to or in any way connected with the duties of said receiver or the funds or assets of the defendant above mentioned or their transfer, sale, or delivery, unless at least five days' notice of such application be first given to the attorney general of the State of New York, and copies of all orders made or procured shall be promptly served on the attorney general.

It is further adjudged and decreed that all money of said defendant be immediately deposited by said receiver in the United

States Trust Company of the City of New York to the credit of said receiver, to be held by said last-mentioned company subject to the further order of the court, and said money so deposited as aforesaid with said company shall not be delivered over by it, except subject to and in pursuance of the order of this court.

And it is further adjudged that the plaintiff recover of the
18 defendant, The Knickerbocker Life Insurance Company, the sum of fifty-five ($55) dollars and costs and disbursements of this action; which said sum the said receiver is hereby directed to pay to the attorney general.

[SEAL.] J. S. LANDON, *J. S. C.*

In the Supreme Court of the State of New York.

In the Matter of the Claim of PLEASANT H. PENDLETON, CORNELIA DIXON, MARY E. PENDLETON, and FRANCIS M. PENDLETON
against
CHARLES H. RUSSELL, Receiver, &c., of the Knickerbocker Life Insurance Company.

To the supreme court:

I, Leroy B. Crane, to whom was referred the foregoing claim, do respectfully report as facts—

First. For an annual payment of $364.60, to be prepaid on or before the 14th day of July in each year, at Memphis, Tenn., the said company insured the life of Samuel H. Pendleton, Arkansas county, Ark., for the term of his natural life for the benefit of the claimants, his children. By the policy of insurance issued to Pendleton the omission to pay the annual premium on or before twelve
19 o'clock noon on the day or days designated for the payment thereof, or failure to pay at maturity any note, obligation, or indebtedness (other than the annual credit or loan) for premium or interest thereon, rendered the policy void without notice to any one interested therein.

Second. The second premium, falling due on July 14th, 1871, was never paid. On that day, however, the said Samuel H. Pendleton gave the agents of the company, at Memphis, a sight draft on Moses Greenwood & Son, of New Orleans, La., for $44.50, which was paid, and a time draft on them as follows:

"$325.00. AUBURN, ARK., *July 14th*, 1871.

"Three months after date, without grace, pay to the order of the Knickerbocker Life Insurance Company three hundred twenty-five dollars, value received, for premium on policy No. 2346, which policy shall become void if this draft is not paid at maturity.

"S. H. PENDLETON.

"To Moses Greenwood & Son, New Orleans, La."

Third. A renewal receipt was thereupon given him by the agents.

Fourth. The said draft for $325 was forwarded by said agents to New Orleans for collection, with instructions not to protest. It was

received by a New Orleans bank September 29th, 1871, presented for acceptance, and acceptance refused. It was returned to Memphis, but forwarded back to the bank at New Orleans October 3d, 1871.

Fifth. At maturity the draft was presented by the bank to the drawees for payment, which was refused. The drawer had no funds with the drawees to meet the draft.

20 Sixth. On the 29th of September, 1871, the day the draft was presented for acceptance, the drawees wrote the drawer that they refused to accept, and if he wanted it paid to notify the drawees. On the 3d of October, 1871, the agents of the company wrote to the drawer of the refusal to accept. No attention was paid by the drawer to either letter — October 27th, 1871, several days after the maturity of the draft, when he wrote the drawees acknowledging their letter of September 29th, and ask- the drawees to pay the draft.

Seventh. The drawer was negligent in not providing funds or obtaining the promise of the drawees before maturity to pay at maturity, and had no reasonable expectation that the draft would be paid at maturity.

Eighth. On the 5th of November, 1871, the drawees wrote the drawer that his letter of October 27th was the first advices they had about the draft and would now pay it. On the 20th of November, 1871, the agents of the company again wrote the drawer of its nonpayment. Soon after he called on them and said the drawees would now pay it, but they told him as the policy had lapsed for nonpayment he must be re-examined to open the policy. He promised to call again, but did not, and died March 26, 1872. The draft never has been paid.

Ninth. The only notice of death given the company was a letter from a brother-in-law of insured to the agents, who replied that the policy had elapsed. No proofs of loss were furnished.

Tenth. An action was begun in the Tennessee circuit court in the name of the children against the company, process being served on the agents of the company, at Memphis, on the 10th of Sep-
21 tember, 1875. The cause was removed to the circuit court of the United States April 17th, 1876, issue there joined, and the cause tried on the 7th of January, 1881. A verdict was rendered for the plaintiffs for $15,175, and judgment entered May 19, 1881.

Eleventh. On the 28th of May, 1881, a writ of error was taken by the company from the judgment to the Supreme Court of the United States. A supersedeas bond was given by the company in the sum of $20,000. To secure the sureties on that bond the company encumbered its property situate in the State of New York to them to the extent of $21,000.

Twelfth. On the 29th of December, 1882, in an action in the supreme court of the State of New York, begun by the people of the State against said company, judgment was rendered dissolving said company and forfeiting its corporate rights, privileges, and franchises, and appointing the said Charles H. Russell receiver of the

property of said corporation. Said receiver qualified and proceeded with the duties of his trust.

Thirteenth. Upon report by the receiver to the supreme court of this State of the situation of the suit of Pendleton against the company in the Supreme Court of the United States he was directed to and did employ counsel to argue the cause in that court. The argument was had in the latter part of 1884, and in January, 1885, a judgment was rendered in said court reversing the judgment of the circuit court and awarding a new trial, but it retained the mandate till adjournment of the term, according to its practice. Pending such retention the claimants, by counsel, filed a petition for reargument, which was sent to counsel, who argued the cause for the company.

22 Before disposing of such petition it was discovered by said court that the writ of error and citation were addressed to Pleasant H. Pendleton alone, and thereupon said court of its own motion ordered the parties to show cause why their judgment should not be vacated and the writ of error dismissed. Argument was had by same counsel on the 6th of April, 1885, the receiver filing a petition for amendment stating the incumbering of the property to secure the sureties; that thereafter the said court made an order amending the writ of error and citation by adding the names of the other three claimants, but not otherwise changing the record as to parties, upon condition that said other claimants have their day in court by the allowance of a reargument in said court. Counsel on both sides accepted such condition, and thereafter the cause was reargued and judgment was again reversed and a new trial ordered, and, with the exception of the circumstances herein stated, the receiver had no personal management or control of the said suit of Pleasant H. Pendleton and others in the circuit or Supreme Court of the United States.

Fourteenth. The mandate of the Supreme Court of the United States was filed with the clerk of the circuit court of the United States for the western district of Tennessee Dec. 11, 1885; and thereupon, to wit, on the 25th day of January, 1886, the claimants proceeded to take judgment by default against said company for $17,560.12 damages, besides costs, amounting to $90.34, and now upon the hearing before the referee make a claim upon said judgment against the funds in the hands of the receiver as a proven claim.

As Conclusions of Law.

First. That the judgment was without jurisdiction as against the assets under the control of this court.

23 Second. It had no binding force, except as against property discoverable in Tennessee.

Third. The policy issued Samuel H. Pendleton was avoided by his failure to pay the second premium and the draft of $325.

Fourth. No valid claims exist in favor of the claimants.

Fifth. That the claim presented is not a legal charge and not entitled to a distributive share of the assets of the company.

Dated New York, April 1st, 1886.

Respectufuliy submitted,

LEROY B. CRANE, *Referee.*

New York Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK *vs.* THE KNICKERBOCKER LIFE INSURANCE COMPANY, Claim of PLEASANT H. PENDLETON *et al.* } Findings Proposed by Claimants.

This claim having been referred to me, Leroy B. Crane, as referee, to determine the validity thereof by an order entered herein on the 3d day of February, 1886, I do hereby make the following findings of fact and conclusions of law:

24 *Findings of Fact.*

I.

That prior to the 19th day of May, 1881, an action was pending in the circuit court of the United States for the western district of Tennessee, wherein these claimants were plaintiffs and the Knickbocker Life Insurance Company was defendant; that said action was based upon a policy of life insurance issued by the said Knickerbocker Life Insurance Company; that said court then had jurisdiction of the persons of all the parties to said action and the subject-matter thereof.

Found.

II.

That said cause was afterwards brought to trial, all parties appearing thereat, and verdict and judgment were rendered for plaintiffs therein, said judgment having been entered on the 19th of May, 1881.

Found.

III.

That said The Knickerbocker Life Insurance Company sued out a writ of error from the Supreme Court of the United States to review said judgment, and that a citation thereupon issued.

Found.

IV.

That said citation issued against one only of the four plaintiffs in the court below, where said judgment had been entered as aforesaid.

Found.

V.

25 That to stay the execution on said judgment said The Knickerbocker Life Insurance Company made and filed a supersedeas bond with two sureties in the sum of $20,000, and thereupon deposited with said sureties for their indemnity property of said Knickerbocker Life Insurance Company of the value of $20,000.

Refused except as found in report.

VI.

That said The Knickerbocker Life Insurance Company was dissolved by a judgment entered herein on December 29, 1882, and thereupon one Charles H. Russell was appointed receiver of said company, and duly qualified and entered upon his duties as such receiver.

Found.

VII.

That thereafter said receiver took charge of said case of Pendleton *vs.* The Knickerbocker Life Insurance Company in the Supreme Court of the United, States and by counsel argued same and procured a decision reversing the judgment appealed from.

Refused except as found in report.

VIII.

That thereafter an order to show cause was made in said action and served on said receiver requiring him to show cause why said writ of error should not be dismissed and the judgment below affirmed for the reason that three of the four plaintiffs below were not in court by citation.

Found.

IX.

That thereafter said receiver filed his petition in said ac-
26 tion verified April 2d, 1885, praying that said writ of error and citation might be amended *nunc pro tunc* so as to include the omitted plaintiffs; that said petition was granted on condition that said omitted plaintiffs have their day in court; that thereupon said cause was reset for a day certain and thereafter argued by counsel for said receiver as well as for said claimants, and a judgment of reversal was rendered.

Found.

X.

That thereafter said receiver obtained the usual mandate from the Supreme Court of the United States and presented same to the circuit court of the United States for the western district of Tennessee, and thereupon, on Dec. 15th, 1885, obtained from that court an order reversing the judgment appealed from, which order had

the effect of releasing the sureties on said supersedeas bond; that thereupon said receiver obtained from said sureties, for the benefit of the estate represented by him, the $20,000 worth of property above referred to, which had been previously deposited with them for their indemnity; that said order awarded defendant the costs of the appeal to the United States Supreme Court, and directed that execution issue against the plaintiffs therefor, and further directed that said cause stand for trial at that term of said circuit court.

Refused except as found in report.

XI.

That said cause was reached and called in its regular order on the calendar of said circuit court, pursuant to the order aforesaid, on the 25th day of January, 1886; that thereupon a jury was called and the evidence on behalf of the plaintiffs therein was sub-
27 mitted to said court and jury, no one appearing in opposition thereto, and a verdict was rendered by said jury in favor of said plaintiffs; that thereupon a judgment was rendered by said court on said verdict in favor of plaintiffs, claimants herein, for the sum of $17,560.46 damages and $90.34 costs, which said judgment is still wholly unpaid.

Refused except as found in report.

Conclusions of Law.

And I find as a first conclusion of law that said judgment is a valid claim against the receiver herein and the estate represented by him, and that same is entitled to participate equally in the distribution of the estate herein with claims on which dividends have been heretofore paid.

Decline to so find.

II.

And I find as a second conclusion of law that by virtue of the provisions of article IV, section 1, of the Constitution of the United States and the laws passed by the Congress of the United States pursuant thereto, and by virtue of the full faith and credit to which judicial proceedings of one State are entitled in every other State, the judgment aforesaid is a valid and binding judgment upon the receiver herein.

Decline to so find.

28 New York Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK
vs.
THE KNICKERBOCKER LIFE INSURANCE COMPANY.

Claim of Pleasant H. Pendleton *et al.* Exceptions.

GENTLEMEN: You will please take notice that Pleasant H. Pendleton and others (the claimants herein) except to the findings of Leroy

B. Crane, Esq., the referee herein, which said findings were filed in the office of the clerk of the city and county of New York on the 10th day of April, 1886, and for cause of exception shows:

First exception. To the whole of the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, and 9th findings of fact, for that they relate to facts concerning the cause of action on which the judgment filed as a claim herein was based. Said claim, as filed, is in terms based upon the judgment alone, as a judgment binding upon the receiver herein. The original policy of insurance upon which the suit which resulted in said judgment was brought was not presented to said referee as a claim, and its validity as an original cause of action was not in issue before said referee. Further, there was no competent evidence before said referee upon which to base said finding.

Second exception. To the whole of the 13th and 14th findings of fact, for that they are not supported by the evidence presented to said referee.

Third exception. To the 3d conclusion of law, for that the facts upon which said conclusion was based were not in issue be-
29 fore said referee; neither was any competent evidence before said referee tending to prove such facts.

Fourth exception. To the whole of the 1st, 2d, 4th, and 5th conclusions of law, for that the same should have been that the judgment therein referred to is a valid and binding judgment against the receiver herein and should be allowed to be filed as a claim herein, and that said claim is a valid charge against the assets of the Knickerbocker Life Insurance Company, and entitled to share equally with other creditors in the distribution thereof.

You are further notified that said claimants further except to the refusal of said referee to find the specific propositions submitted to him by said claimants, as follows:

To his refusal to find the 5th, 7th, 10th, and 11th findings of fact proposed by said claimants.

And to his refusal to find the 1st and 2d conclusions of law proposed by said claimants.

A. WALKER OTIS,
Attorney for Claimants, 2 William St., New York.

To E. H. Hobbs, Esq., attorney for receiver, and Hon. D. O'Brien, attorney general.

30 N. Y. Supreme Court.

In the Matter of the Claim of PLEASANT H. PENDLETON, CORNELIA DIXON, MARY E. PENDLETON, and FRANCIS M. PENDLETON
against
CHARLES H. RUSSELL as Receiver, &c., of the Knickerbocker Life Insurance Company.

GENTLEMEN: You will please take notice that on the annexed report of Leroy B. Crane, as referee, and the order proposed thereon, copies of which are herewith served upon you, I shall move this

honorable court, at a special term to be held at the chambers thereof, at the court-house, in the city of New York, on the third Monday of April, 1886, at 11 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, that the said report be confirmed, and for such other and further relief as may be deemed just and equitable.

Dated April 9th, 1886.

Yours, &c.,

EDWARD H. HOBBS,
Attorney for Receiver, 52 *William Street, N. Y.*

To Hon. D. O'Brien, attorney general; A. Walker Otis, attorney for claimants, 2 William street, N. Y.

31 At a special term of the supreme court held in and for the city and county of New York, at the court-house in said city, on the 30th day of April, 1886.

Present: Hon. George P. Andrews, justice.

THE PEOPLE OF THE STATE OF NEW YORK *vs.* THE KNICKERBOCKER LIFE INSURANCE COMPANY.	In the Matter of the Claim of Pleasant H. Pendleton and others.

This matter having come before the court upon an application made by Charles H. Russell, as receiver of the Knickerbocker Life Insurance Company, to confirm the report of Leroy B. Crane, Esq., disallowing the said claim—

Now, upon reading and filing the report of the said referee and the testimony taken before him, together with the findings proposed by the claimants and the action of the referee thereon, together with the exceptions thereto filed by said claimants—

And upon proof of service of the notice of motion upon said application upon the attorneys for the said claimants, and this proposed order thereon upon the attorney-general; and after hearing Mr. James M. Gifford in behalf of said receiver and Mr. A. Walker Otis on behalf of said claimants in opposition thereto, the attorney general appearing, and on motion of Edward H. Hobbs, attorney for the said receiver—

It is ordered that the exceptions filed on behalf of the said claimants to the said report be, and the same hereby are, overruled, and the said report hereby is in all things confirmed.

32 There was no opinion by Andrews, J., at special term.

In the Supreme Court of the State of New York.

THE PEOPLE, &c., *vs.* THE KNICKERBOCKER LIFE INSURANCE COMPANY.	*In re* Claim of Pleasant H. Pendleton *et al.*

To avoid the necessity of printing the evidence given by the receiver to show the claim on the original policy to be not well founded, it is stipulated that no claim is made or will be made by

claimants on appeal that the referee should have allowed their demand on account of the policy of insurance upon which their judgment was founded, but that they rest their right to a reversal of the order of the special term solely on the conclusive character of the judgment on which their claim is founded, and this stipulation shall be printed in the appeal book in lieu of such evidence.

Dated Dec. 29th, 1886.

A. WALKER OTIS,
Attorney for Claimants.
J. A. DENNISON,
Attorney for Receiver.

33 New York Supreme Court, City and County of New York.

THE PEOPLE OF THE STATE OF NEW YORK *vs.* THE KNICKERBOCKER LIFE INSURANCE COMPANY. } *In Re* Claim of Pleasant H. Pendleton *et al.*

SIR: Take notice that the claimants herein hereby appeal to the general term of this court from the order entered herein on the 13th day of May, 1886, confirming the report of the referee disallowing their said claim, and that this appeal is taken from the whole of said order and from each and every part thereof.

Dated New York, May 20, 1886.

A. WALKER OTIS,
Attorney for Pleasant H. Pendleton et al., Claimants, &c.

To Edward H. Hobbs, Esq., attorney for receiver; Denis O'Brien, Esq., attorney general; James A. Flack, Esq., clerk of the city and county of New York.

34 At a general term of the supreme court of the State of New York, for the first department thereof, held at the court-house, in the city of New York, on the 23rd day of April, 1887.

Present: Hon. Charles H. Van Brunt, P. J.
" John R. Brady, } JJ.
" Charles Daniels, }

THE PEOPLE OF THE STATE OF NEW YORK *vs.* THE KNICKERBOCKER LIFE INSURANCE COMPANY; *In Re* Claim of PLEASANT H. PENDLETON *et al.*

The appeal of the claimants, Pleasant H. Pendleton *et al.*, from an order of the special term entered in the office of the clerk of the city and county of New York on the 13th day of May, 1886, confirming the report of Leroy B. Crane, Esq., referee, which dis-
35 allowed their said claim, having been called for argument in its regular order on the calendar of this court, and after hearing A. Walker Otis, of counsel for claimants, in support of said appeal and James A. Dennison, Esq., of counsel for Charles H. Rus-

sell, receiver of the defendant, in opposition thereto, it is, on motion of A. Walker Otis, the attorney for said claimants, ordered that said order of May 13, 1886, be, and the same is hereby, reversed, with ten dollars costs and disbursements.

It is further ordered that said claim, being the sum of seventeen thousand six hundred and fifty $\frac{46}{100}$ dollars, be allowed by said receiver as a valid claim against the assets of the defendant corporation, and that he pay thereon the same dividends as have been and will be paid on claims heretofore filed and allowed by him.

36 Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK *against* THE KNICKERBOCKER LIFE INSURANCE COMPANY; *In Re* Claim of PLEASANT H. PENDLETON. } Notice of Appeal.

Take notice that the receiver of the above-named corporation, defendant, hereby appeals to the court of appeals from the order of general term of the supreme court in this action entered in the office of the clerk of the city and county of New York on the 23rd day of April, 1887, and from each and every part of said order.

Dated April 27, 1887.

Yours, &c., JAMES A. DENNISON,
Attorney for Receiver and Appellant.

To Hon. D. O'Brien, attorney general; A. Walker Otis, Esq., attorney for claimant and resp't; James A. Flack, Esq., clerk.

37 STATE OF NEW YORK, *City and County of New York,* } *ss:*

I, James A. Flack, clerk of the supreme court in and for said county, do hereby certify that the foregoing consists of certified copies of the notice of appeal, the order appealed from, and the papers on which the court below acted in making said order.

In witness whereof I have hereunto set my hand and affixed my official seal this 28th day of April, 1887.

[L. S.] JAMES A. FLACK, *Clerk.*

38 First Department, General Term, Jan'y, 1887.

Charles H. Vanbrunt, pres. justice; John R. Brady and Charles Daniels, justices.

THE PEOPLE *against* THE KNICKERBOCKER LIFE INS. CO.

Appeal by Pleasant H. Pendleton and others from an order affirming the report of a referee disallowing a claim presented by them to the receiver of the defendant and against its assets.

A. Walker Otis, for appellants; Leslie W. Russell, for receiver, respondent.

DANIELS, *J.*:

The receiver was appointed to settle the affairs of the insurance company under an interlocutory judgment recovered on the 29th of December, 1882, by which the company was dissolved and its corporate rights, privileges, and franchises forfeited. The judgment, which was the foundation of the claim presented to the receiver, was recovered in the circuit court of the United States including the western division of the western district of Tennessee on or about the 25th of January, 1886, and it was rejected by the referee as unauthorized and incapable of legally sustaining the claim by reason of the fact that it was recovered against the company after it was so dissolved.

39 But it appeared further from the evidence before the referee, whose report was confirmed, that a preceding judgment had been recovered on the trial of the issues in the same court on the 19th of May, 1881. From this judgment on the 28th of the same month a writ of error was taken from the Supreme Court of the United States, and a supersedeas bond for the stay of proceedings was given by the company in the sum of $20,000.00, the sureties in which were secured to the extent of $21,000.00. After the appointment of the receiver he took charge of the proceedings in the action on the writ of error, and employed counsel to argue the cause before the Supreme Court of the United States. It was so argued by the counsel in 1884, and in January, 1885, the court reversed the judgment and directed a new trial, but retained the mandate until the adjournment of the term. Before such adjournment the counsel for the plaintiff in the action filed a petition for a reargument, and, while that was pending, it was discovered by the court that the writ of error and citation thereon had been addressed to but one of the plaintiffs in the action, and on that discovery the court ordered the parties to show cause why the judgment of reversal should not be vacated and the writ of error dismissed. The receiver filed a petition, stating what had been done to secure the sureties in the bond, and asking for an amendment of the writ of error by

40 bringing in the other plaintiffs in the action. This was allowed by the court, and the writ of error was amended and the other plaintiffs made parties upon the condition that there should be a reargument of the case. That condition was accepted. The cause was afterwards reargued, and the judgment was again reversed and a new trial ordered, and on that decision a mandate to that effect was issued to the circuit court. This was filed on the 11th of December, 1885, and an order entered on the authority of the mandate, directing "that the cause be docketed to stand for trial at this term;" and it seems to have been tried and the judgment recovered pursuant to this direction.

The referee considered that this interference in the litigation by the receiver did not authorize the circuit court afterwards to try the cause and direct judgment in favor of the plaintiffs, and whether that was the correct view to be taken of the effect of his interference in the litigation is the point which must control the disposition of

this appeal. If he made himself a party to the proceeding by taking charge of the writ of error and employing counsel who represented him upon the argument and in the other proceedings before the supreme court and afterwards in the circuit court, then he could not by subsequently abandoning the action prevent the
41 plaintiffs from bringing it to trial and obtaining a judgment in it entitling them to participate in the distribution of the proceeds of the assets of the company. That he was not named in the title of the cause as the receiver of the company was not important, for a person may become a party to a legal proceeding without that formality, as was held in Jay *v.* De Groot, 2 Hun., 205, and in Castle *v.* Noyes, 14 N. Y., 329. To make himself a party to the action and to conclude him by the judgment no more was required than the enjoyment of the right to appear and control it—to appeal from the judgment and produce and resist evidence upon the trial of the issues. *Id.*, 332. And the receiver was allowed to place himself, as he voluntarily did, in a position where he secured these rights, for while he did not himself bring the writ of error from the judgment he took charge of it after his appointment and while it was pending and controlled and directed all the proceedings under it, including their extension, so far as to bring in the other plaintiffs in the action, and which as to them had the effect of a new writ. Beyond that the mandate of the court reversing the judgment and directing a new trial was filed under his authority, and the cause was in like manner directed to stand for trial, and as he had been allowed by the court to take charge of the litigation
42 in this manner he undoubtedly was in a position where he had the right to contest the plaintiffs' cause of action upon the trial, and the fact that he voluntarily failed to do that cannot be permitted to relieve him from the effect of his preceding conduct by which he made himself a party to the action. In the proceedings carried on at his instance and under his authority the Supreme Court of the United States must have taken this view of his relation to the litigation, and that his proceedings were regular for that purpose, without being himself substituted as the nominal defendant in the action, for if that view had not been adopted the receiver would not have been permitted to carry on the litigation as he did and to be represented in the argument of the cause, as that was done while it was pending in the Supreme Court. No other view can reasonably be taken of what there transpired than that the court considered him regularly entitled to proceed with the litigation as he did as the receiver of the company, although the company itself had previously been dissolved, and in what he did he has as completely made himself the defendant in the litigation as though he had been named as such in the action.

This case differs in these material circumstances from that of McCulloch *vs.* Norwood, 58 N. Y., 563, for there was no partici-
43 pation there on the part of the receiver in the action in the State of Ohio, in which the judgment sued upon was recovered, and beyond that the illegality of the judgment was determined upon the concession that the law of the State of Ohio relative to the

abatement and revival of actions was the same as that prevailing in this State, which required the receiver regularly to be made a party after the corporation itself had been dissolved. There was neither no such concession in the present case, nor was it made to appear that by the law of the State of Tennessee, in which the action was pending and was tried, there was any irregularity in carrying the litigation to a final termination when the company had during its pendency been dissolved and a receiver of its effects had been appointed. The presumption, on the other hand, would be, from the course of the proceeding before the Supreme Court of the United States, that it was regularly conducted in the name of the company, notwithstanding its dissolution during the pendency of the action. This circumstance also distinguished this case from that of "Matter of Norwood, 32 Hun., 196," and it is supported, to some extent at least, by a decision which was made in "Hibernia Bank *v.* Mechanics' Bank, 21 Hun., 166," and Cruger *v.* H. R. R. R. Co., 2 Kerwan,
44 190, warrants no other or different view, for in that case the conduct held not to be a waiver of the proceeding carried on in the absence of legal authority consisted of mere objections, while here the receiver took charge of and himself conducted the litigation upon the writ of error, the filing of the mandate, and the entry of the direction for another trial. That was a litigation of the action upon its merits, which, according to this authority, would have been a waiver in the proceedings under consideration. *Id.*, 201.

The receiver proceeded so far with the litigation as to deprive by his efforts the plaintiffs of the judgment which they had recovered against the company before it was dissolved, and in that manner he obtained the securities provided for the indemnity of the sureties in the bond on suing out the writ of error. After that he had nothing to gain by continuing to resist the plaintiffs' action unless he might have made a successful defence upon the trial. But that he elected not to attempt, but left the action to be tried under the order entered in the circuit court containing the necessary directions for that pur-
pose. By this abandonment of the litigation, after he had
45 made himself for all practical purposes a party to it and had secured its control, direction, and disposition, he could not relieve himself legally from the result of the proceedings.

The action had become for legal purposes an action against himself as receiver by these proceedings taken under his authority with the sanction of the Supreme Court.

After that no necessity existed for a more formal revival of the action by inserting his name as defendant in place of the company, for he had sanctioned the regularity of the litigation in the shape in which it was terminated by himself continuing it in the name of the company. This rendered the judgment finally recovered legally effectual against him as receiver, and it should have been permitted to be included with the other claims to be paid as far as that might be done out of the proceeds of the assets of the company to be disposed of and distributed by the receiver. The order should be reversed, with the usual costs and disbursements, and an order entered directing the allowance of the claim made, and the receiver

to include it with those of the other claims against the assets of the insurance company.

Decided March 2, 1887.

46 [Endorsed:] The People *vs.* The Knickerbocker Life Ins. Co. (Copy.) Opinion. I concur. J. R. B. C. H. V. B.

47 STATE OF NEW YORK, *ss:*

Court of Appeals.

Pleas in the court of appeals held at the capitol, in the city of Albany, on the fourth day of October, in the year of our Lord one thousand eight hundred and eighty-seven, before the judges of said court.

Witness the Hon. William C. Ruger, chief judge, presiding.

E. O. PERRIN, *Clerk.*

Remittitur, October 4th, 1887.

THE PEOPLE OF THE STATE OF NEW YORK *ag'st* THE KNICKERBOCKER LIFE INSURANCE COMPANY.

Be it remembered that on the 29th day of April, in the year of our Lord one thousand eight hundred and eighty-seven, Charles W. Russell, receiver, &c., the appellant in this action, came here
48 into the court of appeals, by James A. Dennison, his attorney, and filed in the said court a notice of appeal and return thereto from an order of the general term of the supreme court of the State of New York, and Pleasant H. Pendleton *et al.*, the respondents in said action, afterwards appeared in said court of appeals, by A. Walker Otis, their attorney; which said notice of appeal and the return thereto filed as aforesaid are hereunto annexed.

Whereupon the said court of appeals, having heard this cause argued by Mr. Leslie W. Russell, of counsel for the appellant, and by Mr. A. Walker Otis, of counsel for the respondents, and after due deliberation had therein, did order and adjudge that the order of the general term of the supreme court appealed from in this action to this court be, and the same is hereby, reversed and the order
49 of special term affirmed, with costs of the appellant in all courts to be paid by the respondents.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore it is considered that the said order of general term — reversed and order of special term affirmed, &c., as aforesaid.

And hereupon as well *as* the notice of appeal and return thereto aforesaid as the judgments of the court of appeals aforesaid by them given in the premises are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and

provided, to be enforced according to law, and which record
50 now remains in the said supreme court, before the justices thereof, &c.

E. O. PERRIN,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE, *October* 4, 1887.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[L. S.] E. O. PERRIN, *Clerk.*

51 At a special term of the supreme court, held at the court-house, in the city of New York, on the 8th day of December, 1887.

Present: Hon. Abraham R. Lawrence, justice.

THE PEOPLE OF THE STATE OF NEW YORK *against* THE KNICKERBOCKER LIFE INSURANCE COMPANY. } Order on Remittitur.

Charles H. Russell, as receiver of the above-named corporation, having appealed to the court of appeals from the order of the general term of this court bearing date the 23rd day of April, 1887, which order was duly entered in the clerk's office of the city and county of New York on that day, and the said court of appeals having reversed the order of the general term, now, on reading and
52 filing the remittitur from the said court of appeals, and on motion of J. A. Dennison, Esq., attorney for the appellant, it is ordered that the judgment of the court of appeals be, and the same is hereby, made the judgment of this court and the appellant, Charles H. Russell, as such receiver, have execution thereon.

STATE OF NEW YORK, *City and County of New York,* } *ss:*

I, James A. Flack, clerk of the said city and county and clerk of the supreme court of said State for said county, do certify that I have compared the preceding with the original case on appeal, remittitur of court of appeal-, and order of special term in the matter of The People of the State of New York ag'st The Knickerbocker Life Insurance Company on file in my office, and that the same are correct transcripts therefrom and the whole of such originals filed Dec. 8th, 1887.

In witness whereof I have hereunto subscribed
Seal New York. my name and affixed my official seal this 12th day of October, 1888.

$4.50. JAMES A. FLACK, *Clerk.*

53 [Endorsed:] N. Y. supreme court, city and county of N. York. The People of the State of New York *vs.* The Knick-

erbocker Life Insurance Company. Claim of Pleasant H. Pendleton *et als.* (Copy.) Remittitur and order thereon. A. Walker Otis, att'y for claimants, 2 William St., New York.

54 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of New York for the first judicial department, Greeting:

[Seal of U. S. Circuit Court, South. Dist. New York.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being a judgment entered pursuant to a remittitur from the court of appeals of the State of New York, same being the highest court of law or equity of the said State in which a decision could be had in the said suit between The People of the State of New York, plaintiff, and The Knickerbocker Life Insurance Company, defendant, wherein Pleasant H. Pendleton, Cornelia E. Dixon, Charles V. Dixon, her husband; Mary E. Pendleton, and Francis H. Pendleton were claimants and Charles H. Russell, as receiver of said The Knickerbocker Life Insurance Company, appeared and opposed said claim, wherein is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision is against their validity, or where any title, right, privilege, or immunity is claimed under the Constitution or any treaty or statute of or commission held or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under said Constitution, treaty, statute, commission, or authority, and wherein a manifest error hath happened, to the great damage of the said claimants, Pleasant H. Pendleton, Cornelia E. Dixon, Charles V. Dixon, her husband; Mary E. Pendleton, and Francis H. Pendleton, as is said and as appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this thirtieth day of December, in the year of our Lord one thousand eight hundred and eighty-

seven, and of the Independence of the United States the one hundred and twelfth.

TIMOTHY GRIFFITH,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

Allowed by—
SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

55 [Endorsed:] Supreme Court of the United States. The People of the State of New York *vs.* The Knickerbocker Life Insurance Company. Claim of Pleasant H. Pendleton *et als.*, pl'ffs in error. Writ of error. A. Walker Otis, att'y for pl'ffs in error, 2 William St., New York. F. Filed Dec. 31, 1887. The clerk will make return to this writ Oct. 12, '88.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, Joseph M. Deuel, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from — to —, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of —— ——, plaintiff in error, against —— ——, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this — day of ——, in the year of our Lord one thousand eight hundred and eighty-—, and of the Independence of the United States the one hundred and —.

—— ——.

56 CITY AND COUNTY OF NEW YORK, *ss:*

A. Walker Otis, being sworn, says that he is of the age of twenty-one years and upwards; that on the 11th day of January, 1888, at No. 32 Nassau street, in the city of New York, he served the annexed citation on Charles H. Russell, the person therein mentioned, by personally delivering to and leaving with him a true copy thereof, and that he knew the person so served to be the person mentioned and described as Charles H. Russell in said citation.

Deponent further states that on the 31st day of December, 1887, at No. 32 Nassau street, in the city of New York, he served the annexed citation on James A. Dennison, the attorney of record for Charles H. Russell, receiver, in the proceeding referred to in said citation, being the proceeding sought to be reviewed by means of the writ of error mentioned in said citation, by personally de-

57 livering to and leaving with him a true copy thereof, and that he knew the person served to be such attorney of record as aforesaid.

A. WALKER OTIS.

Sworn to before me this 19th day of January, 1888.

[Seal R. Burnham Moffat, Notary Public, Kings Co., N. Y.]

R. BURNHAM MOFFAT,
Notary Public, Kings Co.

Certif. filed in N. Y. Co.

58 THE UNITED STATES OF AMERICA:

To Charles H. Russell, receiver of the Knickerbocker Life Insurance Company:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the office of the clerk of the city and county of New York, wherein Pleasant H. Pendleton, Cornelia E. Dixon, Charles V. Dixon, her husband; Mary E. Pendleton, and Francis H. Pendleton are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness Hon. Samuel Blatchford, associate justice of the
59 Supreme Court of the United States, on the thirtieth day of December, A. D. eighteen hundred and eighty-seven.

SAM. BLATCHFORD, *A. J. S. C.*

60 Received a copy of within citation from attorney for plaintiff in error this 6th day of January, 1888.

CHAS. F. TABOR,
Attorney Gen.

[Endorsed:] Supreme Court of the United States. The People of the State of New York *vs.* The Knickerbocker Life Insurance Company. Claim of Pleasant H. Pendleton *et als.*, pl'ffs in error. Citation. A. Walker Otis, att'y for pl'ff- in error, 2 William St., New York.

61 Supreme Court of the State of New York, City and County of New York.

THE PEOPLE OF THE STATE OF NEW YORK *vs.* THE KNICKERBOCKER LIFE INSURANCE COMPANY; Claim of PLEASANT H. PENDLETON *et al.* } Bond for Costs.

Know all men by these presents that we, Ab'm W. Kennedy, 90 Heyward St., Brooklyn, N. Y., and Burton Drew, 653 Sixth avenue, Brooklyn, N. Y., are held and firmly bound unto Charles H. Russell, receiver of the Knickerbocker Life Insurance Company, in the sum of two hundred and fifty dollars, to be paid to the said Charles H. Russell, receiver, &c.; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our

heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the twentieth day of December, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas the above-named Pleasant H. Pendleton *et als.* have prosecuted a writ of error to the Supreme Court of the United States, State of New York, for the city and county of New York, to reverse the judgment rendered in the above-entitled suit, on the 7th day of December, 1887, which reversed an order of the general term of said court allowing the claim of the claimants entered on the 23rd day of April, 1887:

Now, therefore, the condition of this obligation is such that if the above-named Pleasant H. Pendleton *et als.* shall prosecute their writ of error to effect and answer all costs if they shall fail to make their said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

AB'M W. KENNEDY. [SEAL.]
BURTON DREW. [SEAL.]

Sealed and delivered and taken and acknowledged this 20th day of December, 1887, before me—

[L. S.] R. BURNHAM MOFFAT,
Notary Public, Kings Co.

Certif. filed in N. Y. Co.

[Endorsed:] N. Y. supreme court. The People of the State of New York *vs.* The Knickerbocker Life Insurance Company. Claim of Pendleton *et als.* (Copy.) Bond for costs on writ of error. A. Walker Otis, att'y for pl'ffs in error, 2 William St., New York. I approve the within bond as to form and sufficiency of sureties. N. Y., Dec. 30, 1887. Sam'l Blatchford, A. J. S. C.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Abraham W. Kennedy and Burton Drew, being duly sworn, do depose and say and each for himself says that they are worth the sum of five hundred dollars over and above all his just debts and liabilities.

AB'M W. KENNEDY.
BURTON DREW.

Sworn to this 20th day of December, A. D. 1887, before me—

[SEAL NEW YORK.] R. BURNHAM MOFFAT,
Notary Public, Kings Co.

Certif. filed in N. Y. Co.

62 STATE OF NEW YORK, }
City and County of New York, } *ss:*

I, Edward F. Reilly, clerk of the said city and county and clerk of the supreme court of said State for said county, do certify that I

have compared the preceding with the original bond for costs in The People, &c., &c., *vs.* The Knickerbocker Life Ins. Co., &c., &c., on file in my office, and that the same is a correct transcript therefrom and the whole of such original.

Filed Dec. 31, 1887.

[SEAL NEW YORK.] In witness whereof I have hereunto subscribed my name and affixed my official seal this 10th day of January, 1890.

EDWARD F. REILLY, *Clerk.*

63 Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK *ag'st* THE KNICKERBOCKER LIFE INSURANCE CO.; Claim of PLEASANT H. PENDLETON & Others, Resp'ts. } Oct. 4, 1887.

Leslie W. Russell, for app'l't; A. Walker Otis, for resp'ts.

DANFORTH, *J.:*

The Knickerbocker Life Insurance Company was dissolved in December, 1882, by a decree of the supreme court of this State and the appellant appointed receiver of its property. Prior to that time a judgment had been rendered against the company by the circuit court of the United States for the western district of Tennessee in favor of Pleasant H. Pendleton and others upon a policy of insurance theretofore issued by it. The company sued out of the Supreme Court of the United States a writ of error for its review, and in that proceeding gave a bond, with sureties. The receiver, having ascertained that the company had given these sureties, a mortgage upon certain portions of its property in the State of New York, and an assignment of a mortgage covering other property by way of indemnity against liability on the bond, reported these facts to the court, whose officer he was, and under its direction employed counsel to argue the cause upon the hearing of the writ of error.

64 A decision was afterwards made reversing the judgment and awarding a new trial; but before the mandate was sent down it was discovered that the citation had been irregularly issued, inasmuch as it had been addressed to only one of the four parties who were plaintiffs below, and the supreme court, of its own motion, made an order requiring the parties to the writ of error to show cause why the decision should not for that reason be vacated and set aside and the writ of error dismissed. Whereupon the receiver, by petition, stating to the court his ignorance until that time of the proceedings in question, asked that by amendment the irregularity might be cured, so that the decision should stand and the mandate of the court issued. As a reason for his interference he stated in his petition that "upon taking charge of the property of the company" he found it incumbered by the mortgages and assignment above referred to, "and that all of said property remained incumbered thereby, awaiting the issuance of the mandate of the court."

The request was granted, and after reargument the mandate of the court was issued pursuant to the original decision. The receiver was never made a party to the record in either court, nor did he in any way take part in the conduct of the defense nor control or direct it in any way. Subsequently and on the 25th of January, 1886, the plaintiffs in the action took judgment by default against the company for $17,560.12 damages, besides costs, and presented that judgment as the sole but, as they claim, conclusive basis of a right to share in the funds of the dissolved corporation in the cus-
65 tody of the receiver. The claim so made was sent by order of the court to a referee to determine as to its validity, and he, upon the facts above stated, reported (1) that the judgment was without jurisdiction so far as the assets under the control of the court were concerned; (2) that the claim was not a valid charge nor entitled to a distr-butive share of them. His report was confirmed by the special term, but its order to that effect was reversed by the general term of the supreme court and an order made that the receiver allow the claim as valid against the assets of the company and pay the same in the due course of the administration of his trust. From this order the receiver appeals, and we think properly.

As for the defendant of record, its dissolution put an end to the action, and at the time of the rendition of the judgment it had neither legal existence, capacity to be sued, nor any property against which a judgment could be enforced, while the receiver, who by authority of law had taken its effects, had not been made a party to the action in which the judgment was recovered. It is therefore plain that the funds in his hands should not be affected by it unless by interference or otherwise. Under the direction of the court appointing him he has made himself responsible for the final result of the litigation between the parties (McCullough *v.* Norwood, 58 N. Y., 563). His authority to do the acts relied upon by the respondents was derived from the court from whom he received his appointment, and its exercise was necessary for the protection of property which had come to his hands. He was directed to
66 argue for the plaintiff in error the case as it was presented to the appellate court, and he was allowed to intervene for the mere purpose of protecting such interest as he might have and for the purpose of being heard on the argument. He had nothing to do with any proceeding in the action nor with the cause of action. He was confined to the record of those proceedings and could only submit the judgment of the inferior tribunal to re-examination. He was required to do this because of his interest in the property held by the sureties and his duty to protect it as increasing, if their lien was discharged, the assets in his hands. He would also, it may be assumed, have been bound by the judgment rendered by the supreme court had it been adverse to the plaintiff in error; but the writ of error asserted no claim or demand in behalf of the plaintiff in error. It could not in any way act upon the parties. It acted only upon the record, and because, as the result shows, the receiver successfully pointed to errors in the record which required the reversal of the judgment, it is now

claimed that he is bound by a judgment upon the merits rendered upon a trial in which he did not participate, in an action to which he was not a party, and over which he neither exercised nor assumed control. There is no equity in such a result, and it is not required by the cases cited by the respondent, viz., Castle *v.* Noyes (14 N. Y., 329) and Jay *v.* De Groot (2 Hun., 205). In the first case the master in person was a party in one action and in the other his servant, but the master conducted the
67 proceedings, as was his duty, and the decision was put upon the familiar doctrine that the judgment of a court of competent jurisdiction upon a question directly involved in the suit is conclusive in a second suit between the same parties depending on the same question. It can have no application here, where the question is whether the appellant was a party in fact. In the second there was a motion in a foreclosure case to enter judgment for deficiency. It had been once made and denied. The appealing party, although not a party to the record, was a party in interest and had been then heard both by affidavit and counsel, and for that reason was held to have been an actual party to the motion and subject to the rule that a motion once decided is final unless leave is given to renew. If the appellant were asking to reargue the questions disposed of on the writ of error, the general rule thus stated might apply, he having been once heard. Such, however, is not the object of the present proceeding. The reversal destroyed the effect of the judgment, and the original cause of action was no longer merged but let loose, and the parties litigant were restored to the same condition in regard to it in which they were prior to its rendition. The subsequent trial and judgment concerned that and had nothing to do with the writ of error.

As to the cause of action the receiver has not only not been heard, but he had no right nor opportunity to be heard respecting it. The sole object and reason of his intervention on the hearing of the writ of error was to protect the property in his hands from an in-
68 cumbrance which had no connection with the subject-matter of litigation in the original suit, but which grew out of a distinct and collateral act of the company after judgment in that suit and in aid of its endeavor to avoid it. With those proceedings the court in Tennessee had nothing to do. The receiver committed no act within its jurisdiction, nor was the property which he sought to release ever under its control. It had at no time acquired jurisdiction over him nor over the funds now sought to be reached by force of its adjudication, and we are unable to find any ground upon which the case before us can be made an exception to the general rule that a person is not estopped by a judgment to which he is not a party.

The order appealed from should therefore be reversed and the order of the special term affirmed, with costs of the appellant in all courts to be paid by the respondent.

"All concur."

A copy.

H. E. SICKELS, *Reporter*,
Per C.

[Endorsed:] People ag'st Knickerbocker Life Ins. Co. Opinion. Danforth, J.

69 [Endorsed:] Court of appeals. The People of the State of New York, app'l't, *vs.* The Knickerbocker Life Insurance Co. (Copy.) Opinion.

70 [Endorsed:] Supreme Court U. S. 1891, October term. No. 236. Pleasant A. Pendleton *et al.*, pl'ffs in error, *vs.* Clias. H. Russell, rec'r, &c. Certified copy of bond and opinion. Office Supreme Court U. S. Filed Jan. 11, 1890. James H. McKenney, clerk.

Endorsed on cover: Case No. 13,298. New York supreme court. No. 236. Pleasant H. Pendleton, Cornelia E. Dixon, and Charles V. Dixon, her husband; Mary E. Pendleton, and Francis H. Pendleton, plaintiffs in error, *vs.* Charles H. Russell, receiver of the Knickerbocker Life Insurance Company. Filed October 13, 1888.

Office Supreme Court U. S.
FILED.
MAR 24 1892
JAMES H. McKENNEY.
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 236.

PLEASANT H. PENDLETON, *et als.*, Plaintiffs in Error,

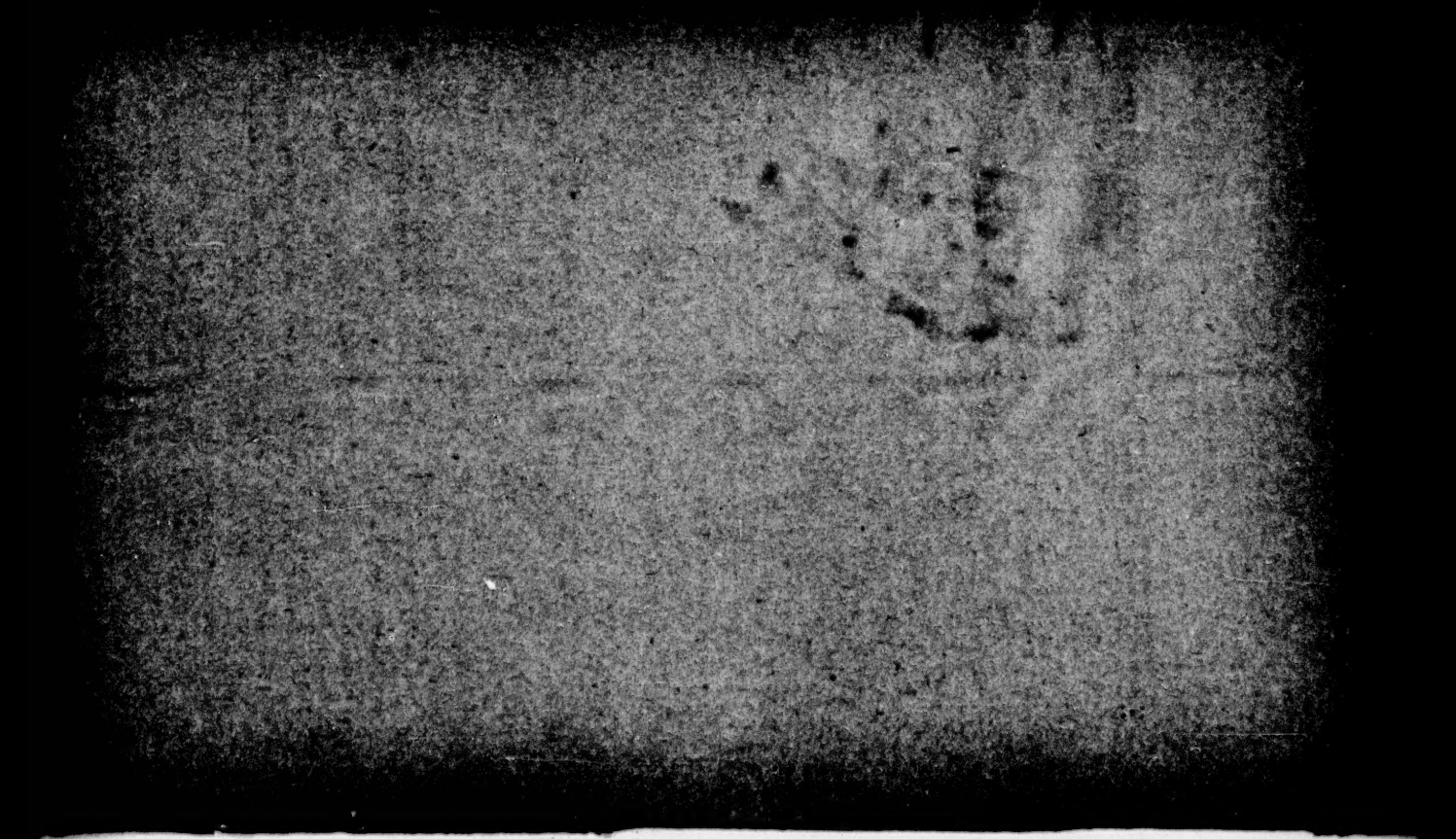
vs.

CHARLES H. RUSSELL, Receiver of the KNICKERBOCKER LIFE INSURANCE COMPANY.

In Error to the Supreme Court of the State of New York.

Brief for Plaintiffs in Error.

A. WALKER OTIS,
Counsel for Plaintiffs in Error,
111 BROADWAY,
NEW YORK.



Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 236.

PLEASANT H. PENDLETON, *et als.*,
Plaintiffs in Error,

vs.

CHARLES H. RUSSELL, Receiver of The Knickerbocker Life Insurance Company.

Statement of the Case.

On May 19th, 1881, in the U. S. Circuit Court, for the Western District of Tennessee, the plaintiffs in error (there being four of them), recovered a personal judgment against the Knickerbocker Life Insurance Company for $15,175.00, on a policy of life insurance issued by defendant therein, on the life of one Dr. S. H. Pendleton, the plaintiffs therein suing jointly as beneficiaries under said policy.

Thereafter said defendant sued out a writ of error from the Supreme Court of the United States to review said judgment, but the citation issued against one only of the four plaintiffs below (p. 6).

Defendants therein, in order to stay the execution of said judgment, gave a supersedeas bond, and to indemnify the sureties therein, deposited with them property of said company of the value of $20,000 (p. 7).

This fact is important, and will be specially referred to hereafter.

While this appeal or writ of error was pending, the Knickerbocker Life Insurance Company was, on the 29th day of December, 1882, dissolved by a judgment of the Supreme Court of the State of New York (p. 8).

Subsequently thereto, the Receiver acting under instructions from said Court, retained counsel and argued the cause of Pendleton *vs.* Knickerbocker Life Insurance Company, in this Court, and the Court handed down an opinion for reversal, and awarding a new trial (p. 6), but before entry of judgment an order was made by this Court and served on the Receiver, requiring him *to show cause why the writ of error should not be dismissed* (p. 6), on the ground that the writ of error and citation had issued against one only of the four plaintiffs below (p. 6).

Thereupon, and on the 2d day of April, 1885, the Receiver *filed a petition in said cause* (p. 7), praying that the writ of error might be amended by adding the names of the omitted plaintiffs, which petition was granted by the Court, *but upon the express condition that the three plaintiffs so omitted have their day in Court by the allowance of a re-argument* (p. 6).

Counsel for the Receiver accepted such condition (p. 6), and the cause was re-argued on a day certain (p. 6), when a decision was rendered reversing the judgment of May 19, 1881, and awarding a new trial (p. 6).

Thereafter the Receiver applied for, and obtained, from this Court, a mandate of reversal (p. 6), and appeared in the Court below and filed said mandate (p. 2, 6), *and himself entered an order awarding a new trial* (p. 4, 6), and directing that defendant recover of plaintiffs therein the sum of $184.91, costs (p. 4).

The order so entered discharged the supersedeas bond, and thereupon the sureties in said bond surrendered to the Receiver for the benefit of the estate represented by him, property worth $20,000, which they had obtained from the Knickerbocker Life Insurance Company, as indemnity for their suretyship (p. 7).

Said order *so entered by the Receiver* in terms provided that "*the cause be docketed and stand for trial at this* (November, 1885) *term*" (p. 4).

At said November Term, and on January 25, 1886, the cause was called for trial *pursuant to the order so entered by the Receiver* as aforesaid (p. 4), and the evidence on behalf of plaintiffs therein was submitted to a jury, who, under the instructions of the Court, found a verdict for plaintiffs for $17,560.00, on which judgment for that amount was entered in form against the Knickerbocker Life Insurance Company (p. 5). The Receiver did not appear on said trial.

The plaintiffs in error filed their claim with the Receiver, based upon said judgment, and $90.34 costs, incident thereto (p 1). Same was referred, by the Supreme Court of New York, to Leroy B. Crane, Esq., as Referee (p. 1). He reported against its validity (pp. 10–13). Plaintiffs in error requested him to find in favor of its validity, which he refused to do (pp. 13–15). They excepted to his findings and refusals to find (pp. 15–16). The Report of the Referee was confirmed at Special Term without opinion, and an order of confirmation entered (p. 17), from which plaintiffs in error prosecuted an appeal to the General Term (p. 18); the order was there reversed, and the Receiver ordered to allow said claim (p. 18). The opinion of the General Term was concurred in by all the Justices (pp. 19–23). From the order of the General Term the Receiver prosecuted an appeal to the Court of Appeals of the State of New York, where the order of the General Term was reversed and that of the Special Term affirmed (p. 23). (See opinion at p. 29.) Judgment was entered in the Supreme Court of New York on the Remittitur (p. 24), from which plaintiffs in error sued out this Writ of Error.

First Point.

A Federal Question is here presented.

The whole case in the Courts below turned on the question whether or not the judgment rendered in the

United States Circuit Court for the Western Division of the Western District of Tennessee was conclusive upon the Receiver.

Plaintiffs in error requested the Referee to find "that by virtue of the provisions of Article IV, Section 1 of the Constitution of the United States and the laws passed by the Congress of the United States pursuant thereto * * * the judgment aforesaid is a valid and binding judgment upon the Receiver" (p. 15).

This request was refused, to which plaintiffs in error excepted (p. 16).

By stipulation the plaintiffs in error rested their right to a reversal solely on the conclusive character of said judgment (p. 17).

Second Point.

The Receiver, by participating in the litigation, and accepting the benefits of the same, is bound by the result thereof.

It is a familiar rule which demands that he who enjoys the benefits of a particular proceeding shall likewise bear its burdens.

Suppose that at the time of the dissolution of the company, an action against it had been pending, but not tried, as in the case of "*In re* Norwood," 32 Hun, 196. The Receiver would then have had the option to do either of two things. He could have refused to have anything to do with the litigation, in which case it could not have gone on. In that event the plaintiff therein would have been obliged to abandon his action and prove his original claim before the Referee herein.

But the Receiver might have thought that he could defeat the claim in the forum where it was then pending. He might, in that event, by permission of the Court of his appointment, have gone there and contested it on a trial. The Court in which the action was pending might, in that case, have compelled him to be substituted as a formal defendant on the record; but if

this had not been required, and the litigation had proceeded under the old title, with the Receiver as an active participant, the plaintiff, if defeated, could not have urged such failure to substitute, in bar of the judgment, still less could the Receiver (let in at his own request) have done so if defeated.

Suppose again that the Receiver in the case above referred to, had asked and had been allowed to defend, and thereupon, at his request, the case had been set for trial on a day certain, at which the Receiver had failed to appear, and a judgment by default had been taken, would he not have been bound as much in one case as in the other?

The principle which governs in such cases, is that of estoppel, whereby, when a party participates in a litigation in order to obtain some advantage, he is estopped to deny that he was a party, when it is sougt to impose on him a liability growing out of the same proceeding.

This principle has been applied where the party did not participate in the litigation, *but had the right to do so.*

This was distinctly held in the case of Castle *vs.* Noyes, 14 N. Y., 329, which is the case of a servant sued in trover. Say the Court:

"In order to the estoppel it is not necessary that the parties on the record in both suits should be the same. *An estoppel by judgment includes all parties who have a right to appear, and control the action, and to appeal from the judgment although not a party to the record.*"

A case decided on the exact principle contended for by plaintiffs in error, is that of Jay *vs.* De Groot, *et als.*, 2 Hun, 205.

In that case the plaintiff was Receiver of the Mechanics' Insurance Company of New York, theretofore dissolved. Risks were outstanding, but the Receiver had no cash with which to re-insure them. He had, however, certain assets, among others, a bond and mortgage made by the De Groots.

The Receiver re-insured the risks with a London (England) Fire Insurance Company, and paid therefor by assigning to the London Insurance Company among

other assets, the De Groot bond and mortgage. The London Company had permitted the Receiver to attend to the details of collection for its benefit.

The Receiver foreclosed the mortgage, and entered judgment for deficiency against the De Groots, *the London Company not being a party to the action.* Subsequently the De Groots moved to set aside the judgment for deficiency, and an order was made, setting it aside, which order was affirmed by the General Term. *On that motion the London Company who did not wish to have the judgment set aside, asked leave to, and did hand in an affidavit at Special Term*, and both there and at General Term, an attorney retained by the London Company, addressed the Court in opposition to the motion, *but said company was not a formal party to the record in any way.*

Subsequently the London Company was brought into the litigation, and demanded an assignment of the bond and mortgage and decree of foreclosure, and that a judgment for deficiency be entered.

Held, that by reason of the participation by the London Company in the motion to set aside the deficiency judgment, it was as completely bound by the result of that motion as though it had there been a party to the record, and that as between the London Company and the De Groots, the question was *res adjudicata.*

The Court, per Daniels, J., say, "There must have been an opportunity for a full and complete hearing, as long as the Insurance Company was allowed to be heard at all. And it was its own fault if it neglected to show anything then existing which would have constituted either a legal or equitable answer to the motion. *This hearing was as effectual as though the company had received notice of the motion and had been named as a formal party to it, for the only object of those forms is to secure to the party an opportunity to be heard in a proceeding taken to affect his rights;*
and that was fully secured by the opportunity which was given to the company, and made use of by it, not only to produce affidavits and be heard on the motion itself, but afterward, also on the argument of the appeal

taken from the order made when the motion was granted. *This made the company an actual party to the motion with all the advantages as well as the disabilities resulting from that relation to it,* * * * and the company having, and also availing itself of the opportunity to be heard, as a party to it, is fully concluded by the disposition which was then made of the judgment now desired to be entered again."

The decision above referred to was not appealed from.

To again illustrate the proposition herein contended for, suppose that just prior to the dissolution of the Knickerbocker Life Insurance Company, a personal judgment had been obtained against it, and thereupon a motion had been made for a new trial on the ground of newly discovered evidence, and pending this motion said Company had been dissolved. Suppose the Receiver had then come into Court and said, "I can procure affidavits and make arguments which I am sure will cause the Court to grant a new trial," and suppose the Court either expressly or by tacit acquiescence had allowed the Receiver to make the attempt. The motion, we will suppose, then came on, was vigorously contested and argued by both sides, and the Court thereupon made an order granting a new trial, and setting the cause for trial on a day certain. Suppose that it had then been called and that again the plaintiff and the Receiver had engaged in the contest, which had resulted in a judgment in favor of the plaintiff. Will it be denied that the Receiver would have been bound by such a judgment.

Suppose the motion and argument for a new trial to have taken place as above. The Court grants the motion and orders a new trial on a day certain, but the Receiver fails to appear. Is a judgment in such case, he having the right to appear, and refusing to avail himself of such privilege, any less binding than if he had in person participated in the trial?

The parallel in the cases stated and the one at bar is perfect, for the writ of error sued out by the Company and maintained by the Receiver, *was simply a prayer for a new trial.*

The mandate of this Court, which must, of course, correspond with the prayer of the party suing out the writ of error, is "that this cause be, and the same is, hereby remanded to the said Circuit Court, *with directions to award a new trial*" (p. 3).

Third Point.

Specific instances in which the Receiver participated in the litigation.

A. His general appearance in this Court, and argugument of the writ of error was, in itself, a "participation" in the broadest sense, on account of the benefits which he thereby hoped to secure for the estate which he represented, not only by obtaining an opportunity to perhaps defeat the claim *in toto*, but by releasing $20,000 worth of property of said estate then held by the sureties in the supersedeas bond (p. 7), and this last he succeeded in doing.

B. He, of his own motion, *and on his own petition* (p. 7), brought into Court the plaintiffs in error, Cornelia E. Dixon, Charles V. Dixon, Mary E. Pendleton and Francis M. Pendleton. These parties had never been brought before the U. S. Supreme Court by citation, and that was absolutely necessary before a reversal could be had. And because of the failure of defendant before its dissolution to thus bring them into Court, this Court issued an order which was served on the Receiver (p. 6), requiring him to show cause *why the writ of error should not be dismissed.*

Now, stopping for a moment right here, suppose the Receiver had failed or refused to appear on the return of the order to show cause. In that event the writ of error would have been dismissed and the claimant's judgment, of 1881, would have stood unassailed and unassailable, for it was then too late to sue out another writ of error.

But the Receiver did not ignore the order to

show cause. On the contrary, he appears *in the cause*, as a petitioner, asking a favor of this Court. He asked that the writ of error might be amended *nunc pro tunc*, by adding the names of the omitted plaintiffs below. Now, did this Court grant the prayer of the petitioner in such a way as to imply that the omitted plaintiffs were in Court? No, but on the contrary, proceeding on the theory that the Court had never acquired jurisdiction of them, it allowed them to be added *nunc pro tunc*, but *upon condition that they have their day in Court* by a re-argument of the writ of error, *and the Receiver accepted such condition* (p. 6.)

"Have their day in Court" are potent words. At whose instance were they brought into Court? That of the Receiver. And having been by him brought into the litigation and their judgment thereby taken from them, shall he, when they are ready to contest with him anew the issues raised by the pleadings, be permitted to fly the jurisdiction of the Court into which he has brought them by his own act?

C. Now, having taken all these proceedings in the cause, and secured a new trial, what does the Receiver next do? He is anxious, of course, to obtain the $20,000 of property in the hands of the sureties in the supersedeas bond.

He procures the mandate of this Court, goes with it to the U. S. Circuit Court, at Memphis, files it there (p. 2) and *himself enters an order* (pp.2,6) reversing the judgment of 1881, *and thereby releasing the sureties aforesaid* (p. 7), *who thereupon surrendered to the Receiver the $20,000 of securities then in their hands* (p. 7.)

This very order so entered by the Receiver, then provides that *the cause be docketed, and stand for trial, "at this term,"* and that the plaintiffs therein pay the costs of this Court, amounting to $184.91, for which the Receiver could have issued execution and levied same on the property of plaintiffs in error.

If the Receiver had been consistent, he would have taken one more step in the cause by participating in the trial thus set for a day in the then present term, but his refusal to do so cannot operate to the prejudice of the

plaintiffs in error. *They* were ready. *They* produced their evidence before a jury, and under the charge of the Court, the jury found for them (p. 4.)

D. It will be observed that all these steps were taken by the Receiver, "acting under the orders of the Supreme Court of the State of New York, which appointed him Receiver" (p. 6.)

Fourth Point.

The Position taken by the Receiver is Untenable.

As I understand the argument of the Receiver, it is that what he has done in the cause is analagous to what a litigant may sometimes do under a special appearance.

In the first place, there is no evidence of any special appearance in the cause by the Receiver. His appearance on the record was a general one.

But, says the Receiver, a defendant may appear specially, and recover his property in an attachment suit by vacating the attachment, without appearing generally in the action, and, therefore, I might have appeared specially in the Memphis suit without incurring any liability.

But the cases are in nowise parallel.

In attachment a suit is begun for the purpose of recovering a money judgment, the issue being, we will say, the execution and delivery of a promissory note. At the same time, and ancillary thereto, an attachment issues to seize certain property until a judgment and execution can be obtained. This attachment, let us suppose, issues on an allegation of non-residence. Defendant may owe the note and yet not be a non-resident. In that event his property was not subject to seizure. It would be a great hardship to say that he could not set aside a wrongful attachment, without becoming a party to the action on the note. The two proceedings are separate and distinct, and rest on entirely different allegations and issues.

Not so in the case at bar. Here there was never but one proceeding and one issue, to wit, the validity of the claim under the policy sued on.

The case of McCullough *vs.* Norwood, 58 N. Y., 562, is not in point. There the Receiver never participated in the litigation in the slightest degree. On the contrary, when the case was called, the old attorney distinctly stated that he was not authorized to represent the Receiver.

A case somewhat similar to the case at bar is that of Habich *vs.* Folger, 20 Wallace, 1.

The substantial proposition contended for by the Receiver in the Courts below was that the United States Circuit Court in Tennessee, never acquired jurisdiction. That in what it did it was dealing with a dead thing.

In the light of the conceded facts this proposition is not sound. This Court and the Circuit Court in Tennessee, so far as this case is concerned, were so connected together that to act in the Appellate Court necessarily involved action in the Court below, for whatever was to be afterwards done in the inferior Court was of course to be done in obedience to the command of this Court. So, therefore, if by the decree of dissolution entered on December 29, 1882, the defendant became so utterly dead that no litigation could go on save by formally reviving against the Receiver, how could the latter in April, 1885, without such revivor, move the cause in this Court, and move it too with such effect as to secure a new trial. If the suit was *ipso facto* abated by the decree of dissolution, then it was as much abated in this Court as in the Court below, and if the Receiver's argument is carried to its logical conclusion, the result must be to show that the old judgment of 1881 is still in full force and effect, because it was not possible to carry on the litigation after the dissolution of the company without a formal revivor against the Receiver, which has confessedly not been done. This is very nearly *reductio ad absurdum.*

But such a line of argument is not in point, and does not touch the real principle which must control this case, and which is of much greater breadth than the one invoked by the Receiver, and withal simple in the extreme.

It is this—Can the Receiver take charge of the litigation under the orders of the Court by which he was appointed, and carry it to a point where he has secured all the benefits thereof, and then, when plaintiffs in error attempt to assert *their* rights, quietly withdraw from the litigation and challenge the power of the Court to carry on the contest.

This question is so ably discussed in the opinion of Mr. Justice Daniels at General Term (p. 20), that I deem it quite unnecessary to attempt to add anything to what is there so clearly expressed.

Fifth Point.

The Court of Appeals overlooked the real point on which this case turns.

I might take the opinion of the Court of Appeals and subscribe to every line, without in the least impairing the position which I desire to impress on this Court upon the argument of this writ of error.

In that opinion the Court sustained the contention of the plaintiffs in error, for, as a reason for not holding the Receiver bound by the judgment, it says, "as to the cause of action, the Receiver has not only not been heard, *but he had no right or opportunity to be heard respecting it*" (p. 31), clearly implying that if he had possessed such rights a different question would have arisen. And again the Court says that the judgment was "*rendered upon a trial in which he did not participate, in an action to which he was not a party, and over which he neither exercised nor assumed control*" (p. 31).

I cannot, of course, assume that the Court here refers to an actual *physical* participation, intending thereby to exclude from the scope of their reasoning the *right* to participate, but rather that they mean that the Receiver neither participated in the trial, nor exercised or assumed control over it, *and that he did not have the right to do so.*

Therefore, it is that I say that my first proposition has been assented to by that Court.

Now, as to my second proposition. It is true that the Court, in four different portions of its opinion, hold that the Receiver did not take part in the conduct of the defense, that he had nothing to do with any proceeding in the action, that he did not exercise or assume control over it, and that he committed no act within the jurisdiction of the Court rendering the judgment.

If he had the right to do these things and failed to exercise it, *our* rights are the same as though he had acted, and that he had such a right is clear because of the following facts which appear in the record.

First.—The Receiver, *of his own motion* in this Court, brought into the litigation three of the four plaintiffs in error herein, all under the express directions of the Court which appointed him Receiver.

Second.—The Receiver appeared in the Court below, filed the mandate and *and himself entered an order awarding costs against the plaintiffs in that suit and setting the cause down for trial at the then present term.*

No mention is made in the opinion of the order of this Court, which was that the original writ of error might be amended upon condition *that the three omitted plaintiffs have their day in Court.*

This condition was accepted by the Receiver, which clearly shows that these three persons were in Court *for the first time, and brought there by the Receiver*, not by the defunct corporation.

As to the second fact above referred to, there is not a word in the opinion in reference to it, but on the contrary, the Court use language consistent only with its having been overlooked, for the Court say "the Receiver committed no act within its jurisdiction" (p. 31.)

It is hard to conceive of a more positive or affirmative act than the entry of an order *by the Receiver himself setting the case down for trial*, for it proves two propotions: 1st. That when the case was called for trial the plaintiffs in error were brought into Court on that par-

ticular day by the Receiver himself, for *non constat* they might not have set the case down for trial to this day, and 2d. *That the Receiver had the right to make defence, control the proceedings and to appeal from the judgment*, and "the right to adduce testimony and to cross-examine the witnesses adduced on the other side."

1 Greenleaf on Evidence, Sec. 523.

All of which shows that the Court of Appeals failed to consider the *facts* which negative the law as laid down in its opinion.

There is nothing in the record to show that the Receiver ever had any thought of a special appearance. On the contrary, he acted just as any one would act who, succeeding to the interests of a litigant desired to take up the litigation just where his predecessor laid it down. The record, shows that discovering the pendency of the writ of error in this Court, he, "acting under the orders of the Supreme Court of the State of New York, which appointed him Receiver, retained counsel to argue the case upon the hearing of the writ of error." Presumably he did so in order to obtain a new trial in the Circuit Court, intending thereby to endeavor to defeat plaintiffs in error on their original claim. The latter had a right to insist that having entered into this contest with them in this Court, he should follow its mandate back to the forum of their choice, and give them the right to contest the issues anew which was secured to them by the mandate of this Court. He should either have done this or else left them entirely alone.

In the opinion of the Court of Appeals, considerable stress seems to be laid upon a proposition, for the first time advanced in the case, to wit: that the object of the writ of error pending in this Court was simply to release the sureties in the surpersedeas bond, that it had nothing to do with the issues in the case, and that the whole case in this Court related only (to quote from the opinion) to "an encumbrance which had no connection with the subject matter of litigation in the original suit, but which grew out of a distinct and collateral act of the

company, after judgment in that suit, and in aid of its endeavor to avoid it."

With great respect I beg to differ with the Court of Appeals on this proposition. The question of supersedeas bond, property in the hands of the sureties, &c., was but incidental to the trial of the issues in the action. Those issues had been decided in favor of the plaintiffs in error, and, as an incident thereto, the defendant was obliged to file, in the Tennessee Court, the supersedeas bond. If, by any subsequent proceedings, the judgment could be reversed, the supersedeas bond would be discharged, but this again would be but an incident to the reversal. *In all the proceedings taken by the Receiver, it was the issues and nothing but the issues which were in controversy.*

Is it likely that the Receiver, on the argument of the writ of error, had anything to say about the supersedeas bond or the property in the hands of the sureties? Of course not. He was in this Court as an active litigant, seeking a reversal on the merits. But, say the Court of Appeals, "the reversal destroyed the effect of the judgment, and the original cause of action was no longer merged but let loose, and the parties litigant were restored to the same condition, in regard to it, in which they were prior to its rendition."

Who then were the "parties litigant" at the time the original cause of action was "let loose" by the reversal? Why clearly the plaintiffs in error on the one hand and the Receiver on the other. Then if they "were restored to the same condition in regard to it in which they were prior to its rendition," they must have been face to face in the Tennessee Court, with the cause of action between them, ready for trial. And this was in fact the precise condition of affairs, for the Receiver came into the Tennessee Court, entered judgment for costs against plaintiffs in error (p. 4), *and of his own volition entered an order that the cause be set down for trial on these very issues at the then present term* (p 4).

It is evident from what the Receiver did in the Tennessee Court, that he then intended to try the issues there, but he subsequently changed his mind, evidently

because he thought he would be defeated in the contest, but the law will not allow a litigant to run away after he has once taken up the gauntlet. Again, I say, that it was the *issues* which the Receiver contested from first to last, and it is now too late for him to say that he was interested in but an incidental question and that, therefore, the Tennessee Court, while it could permit him to come into the litigation and enter judgments and orders on his own motion, could in nowise acquire jurisdiction of his person. I submit that such a position is untenable and that the real position of the Receiver is correctly stated in the opinion of the General Term (pp. 21, 22).

Sixth Point.

The judgment being valid in Tennessee, it should have been under the provisions of the Constitution and laws of the United States, referred to in the second proposed conclusion of law (p. 15), given full faith and credit in the Courts below.

This proposition is well settled and is a logical sequence to the line of argument heretofore taken in this brief.

Seventh Point.

The propositions contended for by plaintiffs in error have been recently enunciated by this Court.

Fortunately for the plaintiffs in error, the extent to which a Receiver may be bound by a judgment rendered in another State, has been examined with great care in a case recently decided by this Court, and we are therefore able to adopt its conclusions, without a re-examination of the principles and cases upon which they are founded. I refer to

Reynolds *vs.* Stockton, Receiver, 140 U. S., 254.

I am familiar with every line of that case, having examined it with great care, and while I may refer to its complex facts upon the argument, it is sufficient at present to quote the conclusions to which the Court arrived. They are as follows:

"Where a Receiver or administrator, or other custodian of an estate is appointed by the Courts of one State, the Courts of that State reserve to themselves full and exclusive jurisdiction over the assets of the estate within the limits of the State. Whatever orders, judgments or decrees may be rendered by the Courts of another State in respect to so much of the estate as is within its limits must be accepted as conclusive in the Courts of primary administration; *and whatever matters are by the Courts of primary administration permitted to be litigated in the Courts of another State, come within the same rule of conclusiveness.*"

This must necessarily be the law. The Court (of the other State) derives its power from the legislature, which can confer upon the Court power to impress its decrees upon persons and property within the State. At that point the law making power has spent its force.

Therefore it is, that while the Court may lay hold of the property of the defunct corporation within its jurisdiction, and bind such property by its judgment, it cannot make a personal decree against the Receiver so as to bind the assets in his hands in the jurisdiction of his appointment, unless he, with the sanction of the Court from which he receives his authority, consents to take part in the litigation.

There is no rule of law which prevents him from litigating in any forum the claims due to or from the defunct corporation, provided he does so under the orders, or with the sanction, of the Court of his appointment; but there are a number of rules and principles of law which preclude him from entering upon such a contest in a foreign forum, and then withdrawing therefrom to the prejudice of his adversary when it suits his fancy or convenience. And that is this case.

If at the time of the Receiver's appointment the Memphis case had been at issue, but not yet tried, I concede that he might have ignored it, in which case it

could not have gone on. But on the other hand, it might have been deemed advisable for him to defend the Memphis suit, and he might have been permitted by the New York Supreme Court to do so. If he had in that state of affairs taken any steps in the cause, he would have been bound to continue, and the judgment would have been conclusive on the Receiver when presented as a claim against the assets in New York. Why? *Because the Tennessee Court had jurisdiction of the person of the Receiver by his own consent, with the sanction of the New York Supreme Court.*

At the risk of repetition, I desire to say, in closing, that when the Receiver, "acting under the orders of the Supreme Court of the State of New York, which appointed him Receiver, * * * retained counsel to argue the case upon the hearing of the writ of error in the Supreme Court of the United States" (p. 6), he came into the cause to stay. That when he opposed the motion to dismiss the writ of error because of the failure to serve the citation on three of the defendants in error, and had them added to the writ of error and citation on condition that they have their day in Court by the allowance of a reargument, he himself brought them into the litigation which prevented him from afterward saying that *he* was not in Court. That when he appeared in the Court at Memphis with the mandate, and himself entered an order setting the case down for trial at the then present term (pp. 6, 4), he again submitted his person to the jurisdiction of the Court. That when he in person filed the mandate in the Memphis Court and invoked the powers of that Court by entering a judgment for $184.91 against the plaintiffs in error (p. 4), he did what he could not do unless the Court had jurisdiction over his person, and that when, by these proceedings, he has taken away the original judgment obtained by plaintiffs in error, entered judgment against them for the costs of this Court, and obtained for the benefit of the creditors of the defunct corporation property worth $20,000 (p. 7), it is the height of injustice to permit him to now ignore the judgment entered in that suit.

It is respectfully submitted that the judgment of the Supreme Court of the State of New York, entered on the remittitur from the Court of Appeals, should be reversed.

A. WALKER OTIS,
Of Counsel with Plaintiffs in Error.

March 1st, 1892.

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Supreme Court of the United States.

NO. 236.

Error to the Supreme Court of the State of New York.

PLEASANT H. PENDLETON, AND ORS,

Plaintiffs in Error,

vs.

CHARLES H. RUSSELL, Receiver of the Knickerbocker Life Insurance Company,

Defendant in Error.

Brief for Defendant in Error.

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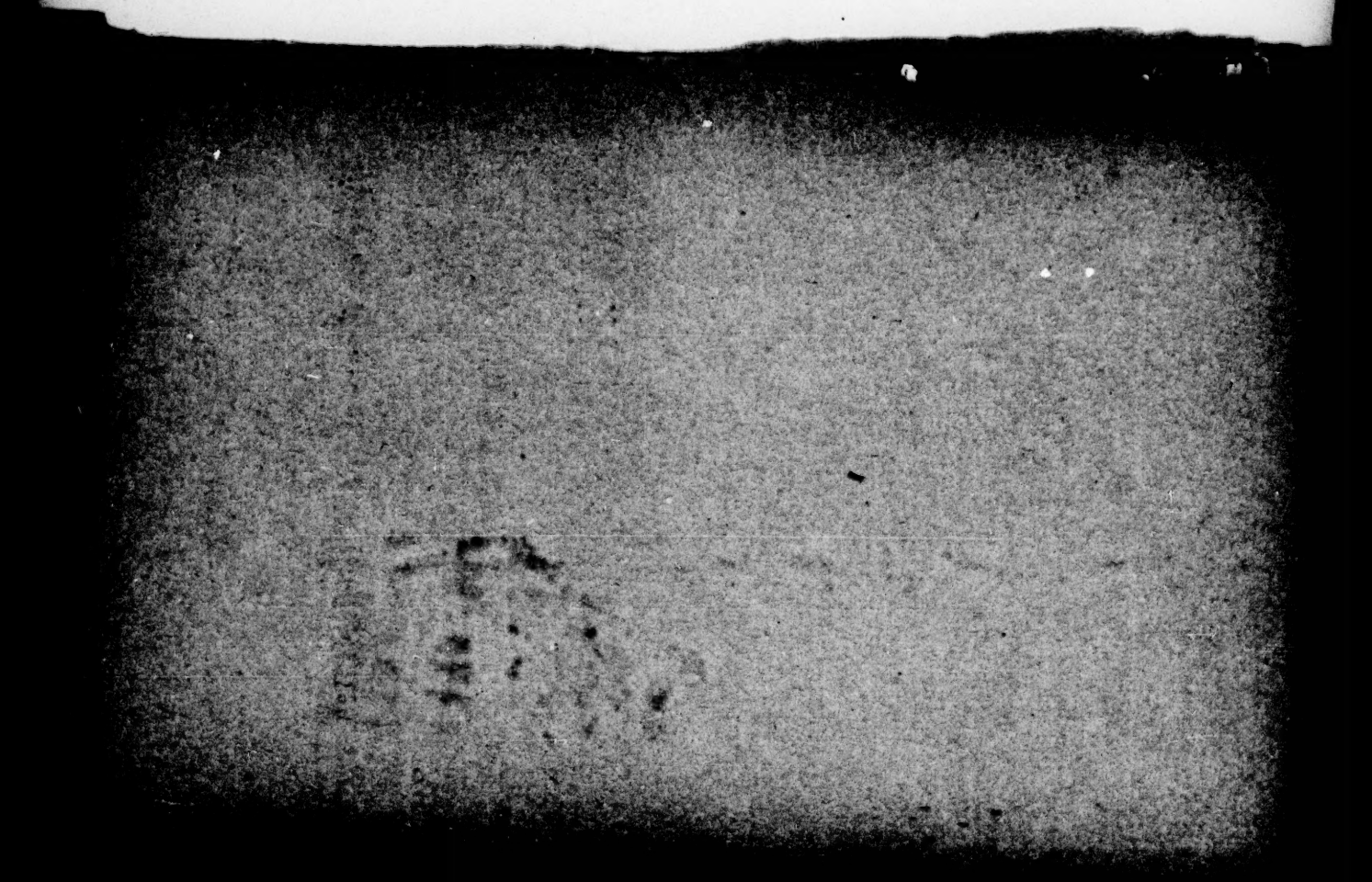

IN THE

Supreme Court of the United States.

PLEASANT H. PENDLETON and others,
Plaintiffs in Error,

against

CHARLES H. RUSSELL, Receiver of the KNICKERBOCKER LIFE INSURANCE COMPANY,
Defendant in Error.

No. 236

Brief

FOR DEFENDANT IN ERROR.

Statement of Case.

The Knickerbocker Life Insurance Company on July 14th, 1870, issued a policy for the sum of ten thousand dollars on the life of Samuel H. Pendleton, payable to the claimants on his death, by the terms of which policy a failure to pay any annual premium avoided the contract (fol. 19).

Only one premium (the first) was ever paid. The sec-

ond premium was attempted to be paid by a draft on Greenwood & Sons, of New Orleans. The terms of the draft appear at fols. 19 and 20. This draft was duly presented for payment, and payment refused, and the premium was never paid (fol. 20).

Subsequently, on the death of the assured, an action was begun in the Circuit Court of Tennessee, September 10th, 1875, by the claimants against the Knickerbocker Life Insurance Company, to recover the amount of the policy. A removal was had to the United States Circuit Court, and the case tried, and judgment rendered for the claimants, May 19th, 1875, for $15,175.00 (fol. 21).

The company sued out a writ of error to the United States Supreme Court, and gave a supersedeas bond in the sum of $20,000, and the case was pending in that Court when, on December 29, 1882, by a judgment of the Supreme Court of the State of New York, the company was dissolved, and Charles H. Russell appointed Receiver of its assets (fol. 21).

The Receiver discovered the pendency of the writ of error to the United States Supreme Court, and, acting under the orders of the New York Supreme Court, retained counsel to argue the case under the writ of error. The United States Supreme Court rendered a decision reversing the judgment, and awarding a new trial. Defendants in error (claimants) filed a petition for a reargument, and the Clerk of the Court sent the said Receiver a copy of the same. It was then ascertained by the Clerk that the original writ of error was defective in that it did not name all the parties plaintiff in the judgment below. Thereupon the Supreme Court, of its own motion, made an order requiring the parties to the writ of error to show cause why the writ should not be dismissed, and such order was served on the counsel who argued the case (fols. 21–22).

The Receiver thereupon, under advice of counsel, filed the petition in evidence at fols. 13 and 14, and counsel retained by Receiver and defendants in error were heard upon such order to show cause. The writ of error was allowed to be amended by adding the names of the parties plaintiff, before omitted, on condition that they had their day in Court; and thereafter the case was re-argued before the Supreme Court, and was again reversed and a new trial ordered.

The Supreme Court issued its mandate reversing the judgment, and the Circuit ordered said mandate to be filed and the cause to be docketed, and stand for trial at the December (1885) Term of said Court (fols. 4–6).

Except, as above stated, the Receiver exercised no personal management or control of the case in the Supreme Court in Washington; and he had nothing to do with it in the Circuit Court in Tennessee, and in no way appeared therein (fol. 12).

Subsequently, on January 25, 1886, the plaintiffs in that suit *without causing the Receiver to be substituted as a party* to the action, and without serving him with any process whatever, took judgment *by default against the Knickerbocker Life Insurance Company* for the sum of $17,560.12 (fols. 8–9).

The claimants then filed their claim against the Receiver in this State, basing their right to recover entirely on such judgment, making no claim whatever on the original cause of action (fols. 2 10, 32).

The claim was rejected by the Receiver and sent to the Referee for trial. The cause was tried, and the Referee made his findings of fact and conclusions of law, wherein he decided the claim was not a legal charge against the assets in the hands of the Receiver (fols. 19–24).

Claimants excepted to the Referee's findings and refusals to find (fols. 28–30), and, after argument, the Special Term made its order confirming the report (fol.

31). From this order the claimants appealed to the General Term (fol. 33).

Claimants stipulated that they rely solely upon the conclusiveness of the judgment rendered against the company by the United States Circuit Court of Tennessee, taken against the company three years after it had ceased to exist; and this without any substitution of the Receiver as a party to that action (fol. 32).

The General Term reversed this order (fol. 35).

The Receiver appealed to the Court of Appeals, and that Court reversed the General Term and sustained the order of the Special Term (fol. 49). The decision of the Court of Appeals having been made the judgment of the Supreme Court (fol. 52), the claimants bring error to the Supreme Court of the United States.

POINTS.

First.—On the merits the judgment of the Referee, who heard this case in the first instance, was right.

The proof showed conclusively that the policy under which this claim was made, and on which the action in the Circuit Court of Tennessee was based, had lapsed months before the death of the assured, and that this resulted from his own deliberate action, and that he made no attempt to comply with the terms on which his default could be excused. After his death it is sought, by means of the technicalities of a judgment taken by default against a corporation that was also dead, to enforce payment of this claim, avoiding thereby all test of the real right of recovery on the merits.

The plaintiff in error practically concedes that on the proofs there could be no recovery by basing his claim here solely on the conclusive character of the judgment of the Circuit Court of Tennessee (fol. 32).

Second.—But one question arises for the consideration of the Court, viz.:

Is the judgment rendered by the United States Circuit Court of Tennessee conclusive against the Receiver?

That judgment was rendered in an action to which the Receiver was in no wise a party, and does not purport to be against him either personally or in his official capacity. It purports to be a judgment against the Knickerbocker Life Insurance Company, rendered long after it had been legally dissolved and had ceased to exist.

It is a well settled rule at common law that, where a corporation is dissolved and a Receiver appointed, the dissolution of such company acts as an abatement of the action, and a judgment subsequently entered against the company is not binding upon the Receiver.

Matter of Norwood, 32 Hun, 196.

The cases are entirely clear upon this proposition. Thus, where an action was brought in the State of Ohio in 1867 against the Lorillard Fire Insurance Company, and such company was dissolved by a judgment of the Supreme Court in the State of New York in 1871, and subsequently judgment was rendered by the Ohio Court against the company.

It was *held*, that such judgment having been rendered without the legal presence of the company, it could not be held to be binding upon the Receiver, there being no order substituting such Receiver as a party in the action.

McCulloch *vs.* Norwood, 58 N. Y., 562.

So where a corporation ceased to exist by reason of the expiration of the term for which it has been chartered, and a judgment was rendered against it after such expiration of its charter, it was held that such judgment was void unless the action had been continued by order

of the Court under the statute to prevent the abatement of actions against corporations.

Sturges *vs.* Vanderbilt, 73 N. Y., 384.
Mumma *vs.* Potomac Co., 8 Pet., 286.

This was the common law rule, and there being no proof of any statutory change of this rule, the common law rule is presumed to have prevailed in Tennessee ; and, indeed, it would be difficult to discern how any statute could change this rule so as to affect the Receiver, he not being within the territorial jurisdiction of the United States Circuit Court of Tennessee.

The dissolution being shown, the common law rule will be presumed to prevail, and it was for the claimants to show their proceedings regular under the statutes of that State.

Third.—Judgments, such as the one under discussion, are not aided by the provisions of the Federal Constitution declaring (Article IV, section 1) that "full "faith and credit shall be given in each State to the "public acts, records and judicial proceedings of every "other State," because such judgments do not fall within the contemplation of that provision.

Matter of Norwood, 32 Hun, 196, 199.

That provision of the Federal Constitution pre-supposes a judicial proceeding duly had under the sanction of complete jurisdiction of the person or subject matter affected, and not a proceeding defective in the very first essential element by which a Court derives its power to render a judgment; and it is for this reason that it is always competent for the Court which is asked to con-

clude itself by such a judgment, to enquire first if such judgment was by a Court that had acquired the necessary jurisdiction of the person or subject matter affected by its judgment.

The United States Circuit Court of Tennessee never acquired any jurisdiction of the Receiver or of the funds in his hands. It never rendered, or attempted to render, any judgment against him. Its jurisdiction over the company had ceased by reason of the cessation of the company's existence. What binding judgment could it render? If it chose to enter a judgment in form it might perhaps do so, but such judgment determined nothing, and could legally determine nothing, as to the validity of the claim made before it. The Receiver was not present, nor had there been any order or proceeding made or taken requiring him to be present. How, then, can he be precluded by such proceedings?

Fourth.—There is nothing in the case of Habich *vs.* Folger (20 Wall., 1), cited by claimants' counsel before the Special Terms, that militates against these views, because:

1. No question arises under United States laws which the United States Supreme Court could review. No appeal was taken from the decision of the Massachusetts Court in the original suit.
2. The judgment in Massachusetts was entered on appearance in form and in behalf of the Receiver, and was consented to by the proper parties.
3. No objection was made to the claim; it was concededly just.

4. In that case the property of the dissolved corporation had been attached within the State, in the hands of the residents of the State who were parties to the action. The Massachusetts Court, therefore, had jurisdiction of the subject matter, and the persons holding it, and could make a valid judgment without acquiring jurisdiction of either the defunct corporation or its Receivers.

Hibernia Bank *vs.* Mechanics' Bank, 21 Hun, 166.

Kelley *vs.* Crapo, 45 N. Y., 86.

In the present case the judgment is invoked, not to sequester property within the jurisdiction of the Court rendering it, but to reach and bind that within the jurisdiction of another tribunal. In cases like the present it is the peculiar province of the Court having the funds in its possession to determine for itself all rights to the fund.

O'Mahony *vs.* Belmont, 62 N. Y., 133, 149.

Fifth.—The record of the United States Circuit Court of Tennessee does not, in any manner, show that that Court acquired jurisdiction of the person of the Receiver. It is not competent to prove by parol evidence in aid of the record that the Court did obtain such jurisdiction.

Noyes *vs.* Butler, 6 Barb., 613

Sixth.—The Receiver represented, not the corporation as an existing body, but takes simply its former

title. In his official capacity he is the representative simply of the rights of the creditors to an equitable share in such assets. It was his duty in their interest to use every endeavor to set aside any judgment improperly granted prejudicial to their interests. They were interested parties, and as such, through their representative, the Receiver, were entitled to be heard in the Supreme Court against the validity of the judgment rendered by the Court below. In the performance of this duty he was acting under orders of this Court. His authority, derived from the Court, extended only to the argument of the writ of error. As an officer of the Court, he could not submit the funds entrusted to his county to a foreign jurisdiction, and thereby conclude this Court, charged with the proper administration of this trust, without its express direction ; nor can it be presumed that this Court, in so directing him, meant that he should go further and submit its rights to the jurisdiction of a foreign tribunal. It was sufficient for the purposes of the trust to make such representation to the Supreme Court necessary to procure the reversal of this judgment. Further litigation as to the claims of the defendants could only properly be had before the Court charged with the administration of the trust. The appearance of the Receiver's counsel before the Supreme Court to object to the validity of the judgment is not an appearance which can bind him to further litigate the matter, nor can he be bound by any judgment subsequently rendered in the action, unless the Court, which renders such judgment, acquired by some proper proceeding jurisdiction of the person of the Receiver.

Cruger *vs.* Hudson R. R. R. Co., 12 N. Y., 190.

The equitable rule that judgments are binding on the

parties and their privies, applies only where a judgment can be properly and legally entered. No matter how much the parties may have litigated their differences, there can be no estoppel until a judgment is legally entered. And this could not be done in the present case until the action had been properly revived.

Seventh.—Certainly, in the first instance, no judgment of the Circuit Court of Tennessee could be binding upon the Receiver as a non-resident of that State, without personal service of the process upon him.

Pennoyer *vs.* Neff, 95 U. S., 714.

Nor, as in the present instance, could he be so bound unless by some proper proceeding he was substituted in the action as the representative of a former party thereto. But this was in no manner done or attempted to be done, as is shown by the record.

Eighth.—A judgment is binding only against the person or the thing.

This judgment was not binding against the Life Insurance Company. That person was dead when the judgment was given, and no revival of representatives was had.

It was not binding against the person of the Receiver. It was not sought to make him a party, even if such an effort would have been available in the Courts of a foreign jurisdiction.

It was not binding upon any assets, for no attachment was issued and levied.

The permission of the U. S. Supreme Court to allow the Receiver to show that the first judgment was an unjust one, only bound the Receiver to accept the result of the judgment he there invoked. It could not compel him to follow the original case into another tribunal. It recognized his right to a standing in the Supreme Court for a special purpose—to remove a security which was a lien upon his assets in favor of the sureties to the supersedeas bond.

It is the theory of our insolvent corporation laws to group together the assets in the hands of an officer of the Court for the discharge of liabilities which are to be adjusted by the Court itself, and not by a foreign tribunal.

It will be noted that no fault is found with the report of the Referee upon the merits of the original claim, although the validity of the policy is set forth as one of the grounds of that claim.

Ninth.—The judment of the Court of Appeals should be affirmed and the writ of error dismissed.

J. A. DENNISON,
Attorney for Defendant in Error.